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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1990

MARVIN PINKNEY,

Petitioner,

v.

JOHN KEANE, Superintendent, Sing Sing Correctional Facility, Ossining, New York,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

DIARMUID WHITE
Counsel of Record
HERALD PRICE FAHRINGER
LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY & CAMBRIA
540 Madison Avenue
New York, NY 10022
(212) 751-1330

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a federal habeas court has the power to redecide a state intermediate appellate court's holding deciding a search and seizure issue in a defendant's *favor,* where the state's highest court has never addressed the issue due to the prosecution's decision not to seek review in that court?

2. Whether the prosecution's decision not to seek review of an adverse order in the state's highest court, thereby barring further review in any subsequent state proceedings, precludes a federal habeas court from reopening and redeciding the issue, under principles of comity, respect for a state's procedural rules and collateral estoppel.

3. Where the state's highest court was never given the opportunity to decide a search and seizure issue under the state constitution or on other independent and adequate state grounds, whether the federal habeas court properly reopened the state intermediate appellate court's determination of the issue and redecided it solely on Fourth Amendment grounds?

4. Where the district court concluded that the federal constitutional claims raised by Petitioner had substantial merit, did the court improperly deny the petition on the grounds that the state intermediate appellate court's order suppressing evidence was also wrong under the constitution?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, reported at 920 F.2d 1090, is reprinted in the appendix at App. 1. The opinion of the district court, reported at 737 F. Supp. 187,

is reprinted at App. 24. The opinion of the New York Supreme Court, Appellate Division, reported at 135 A.D.2d 748, 522 N.Y.S.2d 653, is reprinted at App. 50. The opinion of the New York Supreme Court, Queens County, unreported, is reprinted at App. 54.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1990. This petition for a writ of certiorari is filed within ninety days of that judgment in compliance with Rule 13. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses and papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

New York Constitution, Article I, Section 12, provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon

> probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 28, United States Code, Section 2241, provides in pertinent part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judges within their respective jurisdictions. . . .
>
> . . . .
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless –
>
> . . . .
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . .

Title 28, United States Code, Section 2243, provides in pertinent part:

> A court, justice or judge entertaining an application for a writ of habeas corpus shall . . . dispose of the matter as law and justice require.

New York Criminal Procedure Law, Section 450.90, provides in pertinent part:

> 1. Provided that a certificate granting leave to appeal is issued . . . , an appeal may . . . be taken to the court of appeals by either the defendant or the people from any adverse or partially adverse order of an intermediate appellate court entered upon an appeal taken to such intermediate appellate court.

STATEMENT OF THE CASE

1. Petitioner was indicted by a New York State grand jury for murder and criminal possession of two handguns, one of them the murder weapon. His pretrial motion to suppress the handguns as the fruit of an unlawful search of his car was denied, as were his motions to suppress statements and identification testimony. (App. 54) Petitioner was convicted on all counts following a jury trial.

On appeal, the New York Supreme Court, Appellate Division, Second Department (hereinafter "Appellate Division"), citing both federal and state cases, reversed the convictions for criminal possession of a weapon and ordered the weapons suppressed, finding that the warrantless search of Petitioner's car and the seizure of two handguns from a bag behind the passenger seat was "neither supported by probable cause nor justified by exigent circumstances or any other exception to the exclusionary rule." (App. 51) The conviction for murder in the second degree, however, was affirmed, the court finding that the erroneous introduction of the weapons was harmless with respect to that conviction, even though at trial one of the guns was conclusively proven to be the murder weapon. (App. 51-53)

Petitioner's application for leave to appeal to the New York Court of Appeals from the Appellate Division's affirmance of the murder conviction was denied. Although New York law authorized the prosecution to seek leave to appeal from the order reversing the weapons possession convictions, *see* New York Criminal

Procedure Law, Section 450.90(1), the prosecution did not do so.

2. Petitioner subsequently filed in the United States District Court for the Eastern District of New York a petition for a writ of habeas corpus, claiming that he was denied his federal constitutional rights on various grounds, including that the identification testimony at trial was the product of unnecessarily suggestive procedures, his attorney was improperly barred from attacking the reliability of the identification testimony in summation, and his post-arrest silence was improperly used against him.

In its response opposing the Petitioner's claims, the prosecution noted that it did not agree with the Appellate Division's search and seizure holding, but "accepts it as the law of the case."

After Petitioner filed a reply memorandum, the district court advised the parties that, while the claims raised by Petitioner appeared to have merit, the Appellate Division's holding ordering the weapons suppressed was unpersuasive and, if the weapons were properly before the jury, that evidence would render harmless the errors claimed by Petitioner. The court therefore requested briefing on the lawfulness of the search of Petitioner's car and seizure of the weapons, over Petitioner's objection that the issue could not be relitigated. Following briefing, the court reopened the suppression hearing, over objection, to take additional testimony from the arresting officer and to listen to tape recordings of police radio transmissions that had not been introduced in the state court proceedings.

The district court thereafter denied the petition, concluding that, although Petitioner's claims had "substantial merit," there was no need to resolve them because the Appellate Division had erred in deciding the search and seizure issue. (App. 26) Reexamining the Appellate Division's determination that the search of Petitioner's car was not supported by probable cause, the district court substituted its judgment for that of the Appellate Division and concluded that the search was supported by probable cause. (App. 34-37) Therefore, the court found, the search was lawful under the automobile exception to the warrant requirement. (App. 30-31) As a consequence, according to the district court, the admissible evidence at trial rendered harmless the constitutional errors alleged by Petitioner. (App. 43-49)

The district court rejected Petitioner's objection that relitigation of the search and seizure issue was barred by principles of comity, waiver and collateral estoppel. The court held that "[t]he application of the doctrine of collateral estoppel is not required by considerations of comity or by the Due Process Clause."[1] (App. 39-40) The court further stated that the discretion vested in the command of 28 U.S.C. § 2243 to "dispose of the matter as law

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[1] As to collateral estoppel, the district court concluded that the prosecution did not have a full and fair opportunity to litigate the search and seizure issue, because the realities of the litigation discouraged it from seeking leave to appeal from the Appellate Division's suppression order, that is, the prosecution had "no reason" to seek leave to appeal the weapons possession reversal in view of the concurrent sentence on the affirmed murder conviction and it was "unlikely" that leave to appeal would be granted. (App. 40-42)

and justice require" was appropriately exercised to decline to preclude the prosecution from arguing that the murder conviction should be sustained on the ground that the Appellate Division erroneously decided that the Fourth Amendment was violated. (App. 42-43) This flowed from the fact that *Stone v. Powell*, 428 U.S. 465 (1976), permitted denial of habeas relief where the state appellate court had erroneously decided that the Fourth Amendment was *not* violated, and therefore a district court was permitted to deny relief where an erroneous finding by the state appellate court that the Fourth Amendment *was* violated is a predicate for the relief. (App. 43)

3. The United States Court of Appeals for the Second Circuit affirmed. The court held that a federal court has the power to redecide a search and seizure issue decided by a state appellate court in a petitioner's favor, since 28 U.S.C. § 2241 requires the court to determine whether a prisoner is "in custody in violation of the Constitution or laws . . . of the United States" and since § 2243's command to "dispose of the matter as law and justice require" vests the court with "plenary discretion." (App. 7-8)

The court of appeals rejected Petitioner's argument that the prosecution had forfeited any right to federal review of the search and seizure issue by failing to seek review in the New York Court of Appeals of the Appellate Division's order reversing the weapons possession convictions. The Second Circuit reasoned that the principle underlying the doctrines of exhaustion and procedural default – comity – was inapplicable to constitutional issues decided in a petitioner's favor by a

state appellate court. (App. 8-10) This is so, according to the court of appeals, because that principle is concerned with the unseemliness of federal courts *overturning* state convictions without first allowing the state courts an opportunity to correct any constitutional errors, not faulting state courts for "overzealousness" in protecting constitutional rights. (App. 9-10)

The Second Circuit did not frontally address Petitioner's specific objection that ignoring the prosecution's failure to seek review in the New York Court of Appeals would impermissibly allow a district court to address constitutional issues which had evaded review by a state's highest court, depriving that court of the opportunity to review the issue not only under the federal constitution but under the state constitution. Petitioner had pointed out that a holding of the New York Court of Appeals based on independent and adequate state grounds would have been immune from federal review. The Second Circuit, however, merely observed that whether the New York Court of Appeals might have rested its decision on adequate and independent state grounds was "hypothetical." (App. 12 n.5)

The Second Circuit devoted the bulk of its analysis to whether relitigation of the search and seizure issue was precluded by the doctrine of collateral estoppel. The court, disagreeing with the district court's conclusion that the prosecution did not have a full and fair opportunity to litigate the search and seizure issue, determined that by the ordinary operation of collateral estoppel the search and seizure determination would be conclusive in a subsequent action between the parties. (App. 15) Nevertheless, the court held that, under the circumstances of this

case, collateral estoppel did not bar the district court's reexamination of the legality of the search. (App. 15) The court based this conclusion on several interrelated notions: that collateral estoppel is "less liberally applied" in criminal cases than in civil actions (App. 15); that Petitioner would not be subjected to greater punishment or successive prosecutions, in violation of the Double Jeopardy Clause, by the failure to apply the collateral estoppel doctrine (App. 7-19); and that the Due Process Clause was not violated by the non-application of the collateral estoppel doctrine since the course of the proceedings had followed a constitutional path (App. 19-20). With respect to the last conclusion, the Second Circuit quoted with approval the following portion of the district court's opinion:

> The present habeas corpus application is simply another stage of the same case. It is akin to an appeal by petitioner from the affirmance of the judgment of conviction by the Appellate Division. If the New York Court of Appeals had granted petitioner leave to appeal from the judgment affirming the conviction for murder in the second degree, the Due Process Clause would not have prevented the District Attorney from arguing that the search of the car was valid as an alternative basis for affirmance. There is simply no reason why the District Attorney should be in a worse position here.

(App. 20) Summarizing, the court of appeals noted that collateral estoppel is "essentially a rule of justice and fairness." (App. 20)

Finally, the Second Circuit agreed with the district court that the search of Petitioner's car and the seizure of

the handguns did not violate the Fourth Amendment. (App. 21-23)

REASONS FOR GRANTING THE WRIT

The intrusion of federal judicial authority on state sovereignty is closely circumscribed. Our federal system provides a specific mechanism by which state prosecutors may obtain federal review of an adverse constitutional holding of a state court. On direct appeal, but only after the state's highest court has had an opportunity to pass on the issue, *see* 28 U.S.C. § 1257; *Street v. New York*, 394 U.S. 576, 581-82 (1969), the prosecution may seek certiorari in this Court. *See, e.g., New York v. Class*, 475 U.S. 106 (1986) (reviewing New York Court of Appeals' holding that officer's intrusion into car in order to learn Vehicle Identification Number violated Fourth Amendment); *cf. Santobello v. New York*, 404 U.S. 257 (1971) (reviewing Appellate Division's holding after New York Court of Appeals denied application for leave to appeal).

Here, the prosecution, by declining to seek leave to appeal to the New York Court of Appeals from the Appellate Division's order suppressing the handguns and reversing the weapons possession convictions, chose not to avail itself of the prescribed avenue of review. As a result, New York's highest court was never afforded the opportunity to pass on the search and seizure issue. As a necessary incident to the prosecution's choice, Petitioner lost for all time the opportunity to have New York's highest court address the lawfulness of the search and seizure under the *state* constitution.

Under these circumstances, for a federal habeas court to reopen the search and seizure issue and decide it against Petitioner on Fourth Amendment grounds upsets the carefully balanced relationship between state and federal courts, brushes aside the role of New York's highest court, disregards New York's procedural rules, and invites circumvention of the mode of review prescribed by Congress. Now state prosecutors, in opposing habeas petitions, will be wise to search the state court record for rulings favorable to the defendant and call on the habeas court to subject those state court rulings to scrutiny under the federal constitution. If the court disagrees with those rulings, it may deny the petition, regardless of whether the state's highest court ever had an opportunity to address the issues. Because such an approach by the district court and court of appeals in this case threatens to disrupt the orderly operation of state and federal review, this Court should grant certiorari.

1. It is a well-established principle of federalism that a state court decision resting on adequate and independent state grounds "is immune from review in the federal courts." *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977). The reason for this proscription is to accord appropriate respect to the sovereignty of the States in our federal system. *Id.* at 88. Thus, if in the instant case the handguns were ordered suppressed under state law, the district court *could not* review that suppression order, even if the guns need not have been suppressed under federal law and *even if the introduction of the handguns at trial did not deny Petitioner any federal constitutional right*. Thus, the analysis of the district court and court of appeals is centrally flawed in reasoning that a federal habeas court

must determine the constitutionality of a petitioner's custody *as a whole* and consequently must examine *all* constitutional issues in deciding a habeas corpus petition.

Like the highest courts of other states, the New York Court of Appeals has frequently held, both in the first instance and on remand from this Court, that the state constitution affords citizens of the state greater protection from searches and seizures than the federal constitution affords. *See, e.g., People v. Harris*, 1191 WESTLAW 17114 (N. Y. Ct. of Appeals, Feb. 12, 1991) (on remand, holding that state constitution requires statements obtained following a "*Payton* violation" be suppressed unless taint has been attenuated); *People v. Torres*, 74 N.Y.2d 224 (1989) (holding, contrary to *Michigan v. Long*, 463 U.S. 1032 [1983], that under state constitution police may not, absent probable cause, search passenger compartment of car for weapon after frisking occupants); *People v. Class*, 67 N.Y.2d 431 (1986) (on remand, evidence found in search of car ordered suppressed under state constitution where intrusion was based solely on stop for traffic infraction); *People v. Johnson*, 66 N.Y.2d 398 (1985) (rejecting under state constitution "totality of the circumstances" test for probable cause involving warrantless arrests and searches); *People v. Bigelow*, 66 N.Y.2d 417 (1985) (rejecting under state constitution "good-faith exception" to exclusionary rule); *People v. Belton*, 55 N.Y.2d 49 (1982) (on remand, declining to follow this Court's holding that closed container within passenger compartment of arrestee's car could be searched "incident to arrest"); *see also People v. Stith*, 69 N.Y.2d 313 (1987) (declining to apply "inevitable discovery rule" to secondary evidence).

Here, had the New York Court of Appeals been given the opportunity to review the search and seizure issue and affirmed the Appellate Division's suppression order, it may well have made a " 'plain statement' that [its] decision rests upon adequate and independent state grounds," *Michigan v. Long*, 463 U.S. at 1042, precluding federal review, *id.* This is not unlikely since the Appellate Division, concluding that the warrantless search of the Petitioner's car was "neither supported by probable cause nor justified by exigent circumstances or any other exception to the exclusionary rule" and ordering the guns suppressed, cited, in addition to *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), and *Chambers v. Maroney*, 399 U.S. 42 (1970), two state cases, *Matter of Kwok T.*, 43 N.Y.2d 213 (1977),[2] and *People v. Martin*, 48 A.D. 213, 368 N.Y.S.2d 342 (4th Dept. 1975).[3]

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[2] In *Matter of Kwok T.*, the New York Court of Appeals, in holding that guns seized without a warrant should have been suppressed, cited Article I, Section 12 of the state constitution as well as the Fourth and Fourteenth Amendments to the federal constitution, and stated that warrantless searches and seizures are prohibited, with certain limited exceptions, including the exception that exigent circumstances require an immediate search. *Id.* at 220.

[3] In *People v. Martin*, the court held that the warrantless search of a car the police were pursuing – after it had come to a stop and the defendants fled – was unlawful, concluding that the flight of the defendants may have provided suspicion that the car contained contraband, but not probable cause and, since there was "no immediate threat of disappearance of suspected contraband, a warrant should have been obtained." *Id.* at 347.

But the prosecution, by not seeking to appeal from the Appellate Division's order suppressing the handguns and reversing the weapons possession convictions, chose not to give the New York Court of Appeals the opportunity to address this issue under the state constitution, even though Petitioner did seek leave to appeal to that court from the order affirming his murder conviction. Thus, had the New York Court of Appeals *granted* Petitioner's application for leave to appeal, the prosecution, under New York law, would have been foreclosed from rearguing the search and seizure issue in that court, since the prosecution had not sought leave to cross-appeal. *See People v. Graham*, 36 N.Y.2d 633, 638 (1975); *People v. Birmingham*, 16 N.Y.2d 878 (1965); *People v. Kevlon*, 247 N.Y. 192 (1928).[4] Petitioner, of course, could not seek

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[4] Since the prosecution would have been absolutely foreclosed from rearguing the search and seizure issue in the New York Court of Appeals, the district court and the court of appeals were completely misdirected in stating, as previously set forth:

> If the New York Court of Appeals had granted petitioner leave to appeal from the judgment affirming the conviction for murder in the second degree, the Due Process Clause would not have prevented the District Attorney from arguing that the search of the car was valid as an alternative basis for affirmance. There is simply no reason why the District Attorney should be in a worse position here. (App. 20, 42)

That the *Due Process Clause* would not have precluded such an argument, whatever that might mean, is beside the point since New York's procedural rules would have precluded it. Thus, the prosecution would not have been in a worse position had the district court also precluded the search and seizure issue.

review of the search and seizure issue, since that part of the Appellate Division order was not adverse to him.

2. Federal courts are also generally precluded from reaching the merits of a claim where a procedural default has prevented a state court from ruling on the merits of the claim. *Wainwright v. Sykes*, 433 U.S. 72. This bar extends not only to a default at trial, but to a failure to raise a claim on direct appeal. *See Murray v. Carrier*, 477 U.S. 478 (1986); *Reed v. Ross*, 468 U.S. 1 (1984). This policy recognizes a state's "interest in the integrity of its rules and proceedings and the finality of its judgments, an interest that would be undermined if the federal courts were too free to ignore procedural forfeitures in state court." *Reed v. Ross*, 468 U.S. at 10. Thus, where the failure to press a particular claim on appeal is treated as a procedural default by the state courts, that default will bar subsequent federal review unless some external impediment prevented counsel from raising the claim. *Murray v. Carrier*, 477 U.S. at 492.

Here the prosecution abandoned the search and seizure issue in the state courts, so that it neither was nor could be passed upon by the New York's highest court. Indeed, the prosecution admitted as much when it advised the district court that it accepted the Appellate Division's unchallenged and undisturbed holding "as the law of the case." Thus, assuming that the district court's search and seizure analysis were correct under the federal constitution, the fact remains that there is a reasonable likelihood that the New York Court of Appeals, given the opportunity, would have agreed with the Appellate Division and may well have held that the search was unlawful under the New York's more protective constitution.

Consequently, the district court should not have revived the forfeited search and seizure issue.

3. The district court's and court of appeals' expansive interpretations of the discretion vested in 28 U.S.C. § 2243 to "dispose of the matter as law and justice require" undermine the carefully balanced relationship between state and federal courts, the closely circumscribed authorization for federal judicial intrusion on state sovereignty, and the orderly mode of review prescribed both by Congress and by the state legislatures. The discretion granted in § 2243 is not a license permitting district courts to do what principles of federalism and comity caution not be done. "That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunal of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect the rights secured by the Constitution." *Rose v. Lundy*, 455 U.S. 509, 515 (1982), *quoting Ex parte Royall*, 117 U.S. 241, 251 (1886).

Here, where the Appellate Division carefully considered and decided the search and seizure issue and the prosecution declined to challenge that holding in the New York Court of Appeals as New York's procedural rules permitted it to do, where the prosecution expressly accepted that holding in its papers opposing the habeas petition, and where Congress has never authorized federal district court review of state court holdings favorable

to a criminal defendant,[5] it was an abuse of discretion and an unnecessary affront to New York's courts and procedural rules for the district court to redecide the issue under the purported authority of 28 U.S.C. § 2243.

Deference to a state appellate court's resolution of legal issues is particularly warranted where, as here, the issue is whether or not certain facts established probable cause. Probable cause is "a flexible, common-sense standard," *Texas v. Brown*, 460 U.S. 730, 742 (1983), and "a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully reduced to a neat set of legal rules," *Illinois v. Gates*, 462 U.S. 213, 235 (1983). Therefore, it is peculiarly inappropriate for a federal district judge to substitute his judgment for that of the state appellate judges as to whether probable cause existed. Nothing puts the federal judge in a better position to make that "common-sense" determination. *See* O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 Wm. & Mary L. Rev. 801, 812-14 (1981). The conclusion of state appellate judges that probable cause did or did not exist should not be set aside

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[5] *See generally Allen v. McCurry*, 449 U.S. 90, 103 (1980) (since Congress defines scope of federal district court's jurisdiction, there is no general right to litigate federal constitutional claims in federal court absent Congressional authorization). In 28 U.S.C. § 2241 Congress has provided only the narrowest basis for federal examination of state court criminal proceedings, namely, to determine whether the proceedings denied a petitioner his constitutional rights.

simply because a federal judge would assess the probabilities differently.[6]

The discretion to "dispose of the matter as law and justice require" is not so "plenary" as to override all principles of federalism. The district court and court of appeals undervalued those principles, as is evident from the courts' notion that Petitioner's "habeas corpus application is simply another stage of the same case[,] . . . akin to an appeal by petitioner from the affirmance of the judgment of conviction by the Appellate Division." That notion utterly ignores the distinction between sovereigns. In losing sight of well-established and carefully delineated principles of federalism, the district court and the court of appeals devised a blueprint for their avoidance.

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[6] The instant case produces the anomalous result – in conflict with principles of federalism – that the district court may have accepted factual findings which the Appellate Division rejected. Under New York law, the Appellate Division is empowered to review not only the law but the facts. New York Criminal Procedure Law, Section 470.15(1). Since the Appellate Division reversed the trial court's search and seizure ruling "on the law and the facts" (App. 50), the Appellate Division cannot be said to have accepted the trial court's findings of fact. The district court, nevertheless, accorded the trial court's findings of fact the presumption of correctness provided for in 28 U.S.C. § 2254(d). (App. 26-29) The court of appeals held, despite Petitioner's objection, that this was appropriate because it was "unclear" whether the Appellate Division had rejected the trial court's findings of fact or simply concluded that those facts did not establish probable cause. (App. 4 n.1) Petitioner submits that if it was "unclear," then the trial court's findings of fact cannot properly be *presumed correct*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
March 6, 1991

Respectfully submitted,

DIARMUID WHITE
Counsel of Record
HERALD PRICE FAHRINGER
LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY & CAMBRIA
540 Madison Avenue
New York, NY 10022
(212) 751-1330

Attorneys for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 361 – August Term 1990
(Argued October 18, 1990 Decided December 7, 1990)
Docket No. 90-2250

MARVIN PINKNEY,

Petitioner-Appellant,

-v.-

JOHN KEANE, Superintendent, Sing Sing Correctional Facility, Ossining, New York,

Respondent-Appellee.

Before:

OAKES, *Chief Judge,*
PIERCE and WINTER, *Circuit Judges.*

Appeal from a judgment entered in the United States District Court for the Eastern District of New York, Edward R. Korman, *Judge,* denying a petition for a writ of habeas corpus on the ground that the admissible evidence at trial rendered harmless the errors alleged by petitioner.

Affirmed.

DIARMUID WHITE, New York, NY (Herald Price Fahringer, Lipsitz, Green, Fahringer, Roll, Schuller & James, of counsel), *for Petitioner-Appellant.*

MICHAEL O'BRIEN, Assistant District Attorney, Kew Gardens, NY (John J. Santucci, District Attorney, Queens County, NY, of counsel), *for Respondent-Appellee.*

OAKES, *Chief Judge.*

This case presents the unique situation of a federal court denying a habeas petition on the basis of evidence that the state appellate court had ordered suppressed, the federal court having found that he suppression order was erroneous.

Following a jury trial in the Supreme Court of the State of New York in 1982, Marvin A. Pinkney was convicted of murder in the second degree, criminal possession of a weapon in the second degree, and criminal possession of a weapon in the third degree. He was sentenced to concurrent terms of 25 years to life on Count One, 7½ to 15 years on Count Two, and 3½ to 7 years on Count Three. On direct appeal, the Appellate Division reversed the trial court's denial of a motion to suppress two handguns seized from Pinkney's car, and modified the judgment by reversing the two convictions for weapons possession and dismissing those counts of the indictment. *See People v. Pinkney,* 135 A.D.2d 748, 749, 522 N.Y.S.2d 653, 654 (2d Dept. 1987). The Appellate Division affirmed the conviction for murder, however, finding that the erroneous admission of the handguns was harmless

with respect to that conviction in light of other compelling evidence of Pinkney's guilt. *See id.* The Court of Appeals denied Pinkney's application for leave to appeal the affirmance of the murder conviction. *See People v. Pinkney*, 71 N.Y.2d 1031, 530 N.Y.S.2d 566, 526 N.E.2d 59 (1988). The People did not seek leave to appeal the reversal of the weapons possession convictions.

On March 3, 1989, Pinkney filed a petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of New York, Edward R. Korman, *Judge*, claiming that he was denied his federal constitutional rights on various grounds, including that the identification testimony at trial was the product of impermissibly suggestive procedures, that his attorney was improperly barred from attacking the reliability of the identification testimony, and that his post-arrest silence was wrongly used against him. After all papers were filed, the district court advised the parties that, while the claims raised by petitioner appeared to have merit, the Appellate Division's decision that the two seized handguns should have been suppressed was unpersuasive. The court therefore requested briefing on the lawfulness of the search of petitioner's car and seizure of the weapons, over petitioner's objection that the issue could not be relitigated. The court also held a brief evidentiary hearing on the issue. By memorandum and order dated May 10, 1990, the district court denied Pinkney's petition, concluding that there was no need to resolve the claims presented because the Appellate Division had erred in holding that the search of Pinkney's car and the seizure of the handguns was unlawful, and admission of the handguns rendered harmless the errors

alleged in the petition. *See Pinkney v. Keane*, 737 F. Supp. 187 (E.D.N.Y. 1990). The district court issued a certificate of probable cause pursuant to 28 U.S.C. § 2253, and Pinkney appealed. Because we agree with the district court that appellant's conviction was not constitutionally deficient, we affirm.

BACKGROUND

The pertinent facts regarding the search of appellant's car, which are set out in the trial judge's Memorandum and Order Denying Defendant's Motion to Suppress Evidence, *People v. Pinkney*, No. 2614/81 (N.Y. Sup. Ct. Oct. 25, 1982), and which were adopted by the district court, *see* 737 F. Supp. at 190-91,[1] can be briefly summarized.

On October 1, 1981, at approximately 4:45 p.m., Andrew Kalina was shot to death inside his liquor store

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[1] Appellant suggests that the usual deference accorded to a suppression court's factual findings under 28 U.S.C. § 2254(d) is inappropriate in this case. The claim is that the Appellate Division, which is empowered by New York law to review independently issues of fact, *see* N.Y. Crim. Proc. Law § 470.15(1) (McKinney 1983), rejected the trial court's factfindings. However, it is unclear from the Appellate Division's brief treatment of the search and seizure issue, *see People v. Pinkney*, 135 A.D.2d at 749, 522 N.Y.S.2d at 654 ("Under the facts of this case, the search was neither supported by probable cause nor justified by . . . any other exception to the exclusionary rule"), whether the Appellate Division rejected the facts as found by the trial court, or simply concluded that those facts did not, as a matter of law, support a finding of probable cause. Under these circumstances, we believe that it was appropriate for the district court to defer to the trial court's findings of fact.

at 44-24 College Point Boulevard in Queens, New York. Four persons witnessed a man running out of the store shortly after the shooting. When the first set of police officers arrived at the scene, they found the front door of the store open and its glass shattered. A trail of blood led from the shattered glass to the street outside. The police notified all hospitals in the area to look out for possible suspects seeking treatment for injuries.

Shortly before 5:00 p.m. on the day of the murder, a motorist, Stanley Zadwydos, was involved in an accident with a foreign car on the Interboro Parkway near Queens Boulevard. The foreign car drove off without stopping, but Zadwydos pursued and caught it. He then confronted its driver, who said that he was bleeding and that he was heading for a hospital. The foreign car then sped off again, and Zadwydos eventually lost sight of it. He then notified the police about the accident and gave them the foreign car's license plate number. The police ran a check on the number and learned that the car was registered to Marvin Pinkney.

At approximately 5:15 p.m., Officers William Fitzpatrick and Thomas McGovern received radio instructions to go to the Jamaica Hospital emergency room. They were given a description of the perpetrator of a robbery, and told that he might be injured.[2] As the

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[2] Not mentioned in the state court findings, but noted in the transcript of the suppression hearing and recognized by the district court, is the fact that Officer Fitzpatrick first received a message advising him to investigate an "aided" at Jamaica Hospital, *Pinkney v. Keane*, 737 F. Supp. at 192, that is,

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officers approached the hospital, they noticed footprints of blood, which led them to the emergency room, where a man was being treated for a leg injury. In response to a question by McGovern, the man stated that he had been mugged by two white men, and had walked to the hospital.

Officer Fitzpatrick left his partner with the suspect and began tracing back the trail of blood. It led him directly to a yellow Toyota parked on a public street about 1½ blocks from the hospital. The keys were laying on the hood of the car, and the doors were unlocked. Fitzpatrick entered the car, and saw a pool of blood inside on the driver's side. He then got out of the car, went around to the passenger side, and looked through the side window. He now noticed an open bag from which the handle of a gun protruded. The officer reentered the car and seized the bag, which contained two handguns.

At trial, four eyewitnesses identified Pinkney as the man who had run out of Kalina's liquor store after the shooting and driven away. Stanley Zadwydos testified regarding his hit-and-run accident with the defendant. The People introduced into evidence the two weapons seized from Pinkney's car, one of which, a .22 caliber pistol, contained four spent shells and had been fired shortly before it was seized. A police department ballistics expert testified that the bullet recovered from the

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to investigate the cause of a patient's injury. It was in a second message that Fitzpatrick was informed that the "aided" might have been involved in a recent armed robbery, and was given the robber's description. *Id.*

body of the deceased had been fired from that .22 caliber pistol. Other expert testimony established that blood samples found on the shattered glass from the liquor store door and on Pinkney's clothes and car were genetically consistent with each other, and that the genetic factors found in this blood occur in only six percent of the population.

DISCUSSION

A. *The District Court's Review of the Appellate Division's Suppression Order.*

The principal question raised on this appeal is whether a federal court in a habeas corpus proceeding is necessarily bound by a state appellate court's ruling in petitioner's favor on a matter of federal constitutional law, where that ruling itself reversed a ruling by the state trial court that was adverse to the petitioner. Appellant claims that the answer is yes, and invokes principles of federalism, comity, waiver, and collateral estoppel, among other things, in support of his position. For the reasons set forth below, we disagree with the appellant, and hold that, under the circumstances of this case, the district court did not err in reviving the state trial court's denial of suppression.

The power of the federal courts to grant writs of habeas corpus is derived from 28 U.S.C. § 2241, which provides that any federal court may grant the writ to any person restrained within its jurisdiction or, where the application is made by a state prisoner, convicted and sentenced within its jurisdiction. *See* 28 U.S.C. § 2441(a), (d) (1988). Appellant's first claim is that section 2241 does

not provide a jurisdictional basis for collateral review of a state court ruling adverse to the prosecution. However, the fact that state prosecutors cannot themselves initiate collateral review proceedings in federal court does not mean that federal courts lack power to consider arguments by the State that bear on whether a prisoner is in fact "in custody in violation of the Constitution or law . . . of the United States." 28 U.S.C. § 2241(c)(3) (1988). Moreover, appellant's narrow reading of section 2241 ignores the equitable principles governing the Great Writ, reflected in the plenary discretion vested in habeas courts to "hear and determine the facts, and dispose of the matter *as law and justice require.*" 28 U.S.C. § 2243 (1988) (emphasis added); *see also Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986) (reaffirming equitable nature of habeas writ); *Fay v. Noia*, 372 U.S. 391, 438 (1963) (same).

Even if the district court had authority to reopen the issue of the legality of the search of appellant's car, appellant argues, the District Attorney waived the right to relitigate that issue by failing to seek review of the Appellate Division's suppression order in the Court of Appeals. In other words, appellant would have us impose the exhaustion of remedies requirement, 28 U.S.C. § 2254(b) (1988), on the prosecution.[3] Appellant supports

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[3] Appellant also invokes the procedural default rule, citing *Murray v. Carrier*, 477 U.S. 478 (1986), and *Reed v. Ross*, 468 U.S. 1 (1984), for the proposition that the failure to raise an issue on direct appeal forecloses subsequent federal habeas review. In light of our disposition of appellant's exhaustion argument, which raises all the same concerns as his procedural default argument, we need not address this latter claim.

this claim by arguing that "symmetry" requires prosecutors to overcome the same obstacles that petitioners must face when seeking habeas review.

As a preliminary matter, we believe that symmetry, while aesthetically pleasing, is a particularly inappropriate principle to invoke in a habeas proceeding under 28 U.S.C. § 2254. Habeas corpus is not a neutral proceeding in which the petitioner and the State stand on an equal footing. Rather, it is an asymmetrical enterprise in which a prisoner seeks to overturn a presumptively valid judgment of conviction. Because of this, the petitioner generally bears the burden of proof throughout the habeas proceeding. *See* 28 U.S.C. § 2254(d) (1988) (petitioner must prove "by convincing evidence that [a] factual determination by the State court was erroneous"); *Harned v. Henderson*, 588 F.2d 12, 22 (2d Cir. 1978) (petitioner must prove by a preponderance of the evidence all claims in the petition). *See generally* 1 J. Liebman, *Federal Habeas Corpus Practice and Procedure* § 22.1 (1988) (discussing burdens of proof in habeas proceedings). In addition, issuance of the writ is an extraordinary remedy, *see Goto v. Lane*, 265 U.S. 393, 401 (1924), granted "only in the exercise of a sound judicial discretion." *Id.*; *see also Darr v. Burford*, 339 U.S. 200, 204 (1950) ("[H]abeas corpus is a discretionary writ."). To constrain the State merely to impose some symmetry on an otherwise one-sided proceeding would be to substitute aesthetics for legal reasoning.

Symmetry aside, appellant's position is unsupported by the principles underlying the requirement that petitioners exhaust their state remedies. The exhaustion rule "springs primarily from considerations of comity," *Daye*

v. Attorney General, 696 F.2d 186, 191 (2d Cir. 1982) (en banc), *cert. denied*, 464 U.S. 1048 (1984), and is concerned with the unseemliness of federal courts overturning state convictions without first allowing the state courts an opportunity to correct any constitutional violations. *See Rose v. Lundy*, 455 U.S. 509, 518 (1982).[4] Here, the federal court's review of the state proceeding neither frustrates the state's power to punish offenders, nor impugns the state's good faith in honoring constitutional rights. Indeed, a federal habeas court's correction of a state appellate court ruling in defendant's favor can only result in the federal court's upholding the state conviction and faulting the state court for overzealousness, not neglect, in the protection of federal constitutional rights. Appellant's strange notion of comity, on the other hand, would have us upset a valid state conviction in order to shield an appellate court ruling that overzealously protects federal rights.

Appellant next contends that *Stone v. Powell*, 428 U.S. 465 (1976), which precludes collateral review of most Fourth Amendment rulings adverse to a petitioner, should also preclude collateral review of Fourth Amendment rulings adverse to the prosecution. Once again, we believe that arguments based on symmetry have little force in the context of a habeas proceeding. We also find,

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[4] The procedural default rule, which appellant also invokes, addresses similar concerns. *See Engle v. Isaac*, 456 U.S. 107, 128-29 (1982) (where trial default bars adjudication of constitutional claim in state courts, "the trial court . . . ha[s] no opportunity to correct the defect [and t]he state appellate courts have no[] chance to mend their own fences and avoid federal intrusion").

again, that the reasoning behind the doctrine invoked by appellant does not support appellant's position. *Powell* is premised on the notion that, because the exclusion of unconstitutionally seized evidence is simply a prophylactic device, a petitioner claiming that evidence should have been excluded on Fourth Amendment grounds is merely "asking society to redetermine and issue that has no bearing on the basic justice of his incarceration." *Id.* at 492 n.31. Where a state claims that certain evidence suppressed at the appellate level was properly admitted at trial, however, the Fourth Amendment issue will directly bear on the basic justice of the petitioner's incarceration if the remaining evidence is insufficient to support his conviction, so that the constitutionality of his conviction turns on whether the suppressed evidence was properly admitted in the first instance. Accordingly, we find that the district court's redetermination of the Fourth Amendment issue is not inconsistent with the Supreme Court's holding in *Stone v. Powell.*

The most important reason that the district court should not have reviewed the search and seizure issue, appellant argues, is the well-established principle that a state court decision resting on an adequate and independent state ground "is immune from review in the federal courts." *Weinwright v. Sykes,* 433 U.S. 72, 81 (1977). The claim is that the Appellate Division's suppression order was based on state law, and so could not be reviewed, even if the introduction of the guns at trial did not deny Pinkney and federal constitutional rights. Appellant bases his claim on the fact that the Appellate Division cited two state cases, along with two federal cases, in support of its determination that the search in question

was unlawful. *See People v. Pinkney*, 135 A.D.2d at 749, 522 N.Y.S.2d at 654.

Under *Michigan v. Long*, 463 U.S. 1032 (1983), a state court ruling based on a ambiguous mix of federal and state precedents is assumed to have been based on federal grounds, and so may be reviewed by a federal court, absent a "plain statement" by the state court that the federal cases were used "only for the purpose of guidance." *Id.* at 1041; *see also Harris v. Reed*, 109 S. Ct. 1038, 1042-43 (1989) (holding "plain statement" rule applicable in habeas corpus proceedings pursuant to 28 U.S.C. § 2254). We find that the Appellate Division made no "plain statement" that its suppression decision rested on state grounds, but rather, after cursory reasoning, made ambiguous reference to both federal and state cases.[5] We therefore conclude that the district court could properly reach the search and seizure issue.

Appellant would next have us hold that relitigation of the search and seizure issue was precluded by the doctrine of collateral estoppel.[6] Specifically, appellant

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[5] Appellant's suggestion that we consider what law the Court of Appeals *might* have rested its decision on had it actually reviewed the Appellate Division order is without merit. It is axiomatic that the plain statement rule can apply only to an actual judicial opinion, and cannot apply to some hypothetical opinion of a court that did not review the case. *Cf. Harris*, 109 S. Ct. at 1043 (plain statement rule addressed to "last state court rendering a judgment on the case").

[6] Appellant also invokes the doctrine of res judicata or "claim preclusion." However, because this case does not involve relitigation of a claim or cause of action but only of a discrete issue, the question of res judicata is not presented.

argues that the Appellate Division order reversing Pinkney's weapons possession conviction was a final judgment on the merits, and the decision on the search and seizure issue was a necessary element of that judgment.

The district court's determination that the prosecution was not precluded from relitigating the validity of the search of appellant's car rested, in part, on a finding that the prosecution was not provided a full and fair opportunity to litigate that issue in the state courts. According to the district court, the prosecution did not seek review of the Appellate Division's suppression order because the sentences for the two weapons possession convictions, which were reversed by the order, ran concurrently with the longer sentence for the murder conviction, which was affirmed.[7] *See Pinkney v. Keane*, 737 F.

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[7] The district court also reasoned that "[b]ecause the District Attorney prevailed . . . in sustaining petitioner's conviction for murder in the second degree, he could not appeal from the judgment affirming [that] conviction." and so could not challenge the finding on the subsidiary issue regarding the search of Pinkney's car. *Pinkney v. Keane*, 737 F. Supp. at 196. This, by itself, would indicate that the search and seizure determination was not essential to the judgment, and so has not preclusive effect. *See* D. Siegel, *Handbook on New York Practice* § 465, at 616 (1978) ("[E]stoppel will not operate on any issue which was decided against the winner in the first action."); *Restatement (Second) of Judgments* § 28(1) comment a (1982). The relevant fact in this case, however, is that the suppression ruling *was* essential to the reversal of the weapons possession convictions. Any preclusive effect of the suppression ruling would derive from the reversal, as to which the District Attorney was the losing party, and not from the affirmance.

Supp. at 196. We agree that the District Attorney may have had little incentive to appeal the search and seizure issue.[8] However, while lack of incentive to litigate vigorously may render the collateral estoppel doctrine inoperative, *compare Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979) (defendant's lack of incentive to defend vigorously may make offensive use of collateral estoppel unfair); *Staatsburg Water Co. v. Staatsburg Fire Dist.*, 72 N.Y.2d 147, 154-55, 531 N.Y.S.2d 876, 879, 527 N.E.2d 754, 757 (1988) (same); *Restatement (Second) of Judgments* § 28(5)(c) (1982) (same) *with In re American Ins. Co.*, 43 N.Y.2d 184, 192, 401 N.Y.S.2d 36, 41, 371 N.E.2d 798, 803 (1977) ("The consequences of issue preclusion between the same parties are not to be vitiated by lack of enthusiasm or effort on the part of the loser"), lack of incentive to appeal does not have the same effect. Rather, failure to appeal an adverse judgment negates the preclusive effect of that judgment only when review was unobtainable "as a matter of law."[9] *Restatement (Second) of Judgments*

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[8] There is no merit to appellant's argument that incentive was supplied by the fact that, had the Court of Appeals granted Pinkney leave to appeal, failure to cross-appeal the suppression order might have foreclosed the District Attorney from relitigating the legality of the search and seizure. As the Court of Appeals recently stated, "it would be . . . fundamentally unfair to give preclusive effect to a determination where the only incentive to litigate stems from its potential collateral effects." *Staatsburg Water Co. v. Staatsburg Fire Dist.*, 72 N.Y.2d 147, 155, 531 N.Y.S.2d 876, 879, 527 N.E.2d 754, 757 (1988).

[9] A party is disabled from obtaining review as a matter of law when, for example, "the controversy has become moot, or . . . the law does not allow review of the particular category of judgments." *Restatement (Second) of Judgments* § 28(1) comment a (1982).

§ 28(1) (1982). Where review is available but is not sought, estoppel applies. *Id.* § 28(1) comment a.[10] The District Attorney had sufficient incentive to litigate the search and seizure issue in the Appellate Division, and was not disabled as a matter of law from seeking leave to appeal the reversal of the weapons possession convictions. By the ordinary operation of collateral estoppel, then, the search and seizure issue would be conclusive in a subsequent action between the parties.

Nevertheless, we find that, under the circumstances of this case, the district court's reexamination of the legality of the search of appellant's car was proper. We begin our analysis by observing that, as a general matter, collateral estoppel is less liberally applied in criminal cases than in civil actions, because "considerations peculiar to the criminal process may outweigh the need to avoid repetitive litigation." *People v. Plevy*, 52 N.Y.2d 58, 64, 436 N.Y.S.2d 224, 227-28, 417 N.E.2d 518, 521-22 (1980).[11] In *Standefer v. United States*, 447 U.S. 10 (1980),

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[10] Estoppel applies regardless of whether review is available as a matter of right, or simply as a matter of the appellate court's discretion. *See id.*

[11] Appellant cites *People v. Acevedo*, 69 N.Y.2d 478, 515 N.Y.S.2d 753, 508 N.E.2d 665 (1987), as evidence of the Court of Appeals' new sympathy toward the application of collateral estoppel in criminal cases. The *Acevedo* court held that collateral estoppel, as embodied in the Double Jeopardy Clause, could be applied in a criminal case to bar the State from relitigating evidentiary, as well as ultimate, facts. *Id.* at 487, 515 N.Y.S.2d at 759, 508 N.E.2d at 671. However, the *Acevedo* court

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the Supreme Court listed several considerations peculiar to criminal cases that made the application of nonmutual collateral estoppel[12] against the prosecution inappropriate, including "the important federal interest in the enforcement of criminal law." *Id.* at 24. On this point, the Court noted that:

> '[T]he purpose of a criminal court is . . . to vindicate the public interest in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant. The public interest in the accuracy and justice of criminal results in greater than the concern for judicial economy professed in civil cases and we are thus inclined to reject, at least as a general matter, a rule that would spread the effect of an erroneous acquittal to all those who participated in a particular criminal transaction.'

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reaffirmed the general rule that "for policy reasons," the considerations underlying collateral estoppel are less compelling in criminal prosecutions than in civil actions. *Id.* at 485, 515 N.Y.S.2d at 758, 508 N.E.2d at 670.

[12] This case does not directly implicate the doctrine of nonmutual collateral estoppel, which is relevant only when different parties were involved in the prior proceeding, and has generally been found inapplicable in criminal cases. *See, e.g., Standefer,* 447 U.S. at 21-25 (in prosecution of aider and abettor, Government not precluded from relitigating guilt of principal, who had been acquitted in prior proceeding); *United States v. Ustica,* 847 F.2d 42, 49 (2d Cir. 1988) (on retrial after mistrial, Government not barred from relitigating issue decided in favor of codefendant in separate appeal); *Mancuso v. Harris,* 677 F.2d 206, 209-10 (2d Cir.) (in habeas proceeding, State not barred from relitigating issue decided in favor of codefendant in separate habeas petition), *cert. denied,* 459 U.S. 1019 (1982).

Id. at 25 (quoting *United States v. Standefer*, 610 F.2d 1076, 1093 (3d Cir. 1979) (en banc)). The reasons for applying collateral estoppel less liberally in criminal cases are, we believe, particularly compelling in habeas proceedings, as the initiation of a collateral review inevitably sacrifices the concern for judicial economy underlying the doctrine of issue preclusion. However, while it is well established that collateral estoppel does not bar habeas petitioners from relitigating federal constitutional issues litigated fully and fairly in the state courts, *see Brown v. Allen*, 344 U.S. 443, 458-60 (1953); *see also* 28 U.S.C. § 2254(d) (1988), the extent to which that doctrine bars prosecutors from relitigating issues in habeas proceedings that were necessarily decided in the state courts has, to our knowledge, never been addressed.

When the defendant invokes collateral estoppel in the usual criminal case, the Government is seeking to relitigate an issue in a second prosecution that was necessarily resolved in defendant's favor in an earlier proceeding. Under those circumstances, relitigation is barred by the Fifth Amendment's guarantee against double jeopardy. *See Ashe v. Swenson*, 397 U.S. 436, 445 (1970); *People v. Goodman*, 69 N.Y.2d 32, 37, 511 N.Y.S.2d 565, 569, 503 N.E.2d 996, 1000 (1986). However, "where there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended." *United States v. Wilson*, 420 U.S. 332, 344 (1975). This case does not raise the problem of multiple punishments, which occurs when a court imposes consecutive sentences in a single prosecution based on the same offense, *see Blockburger v. United States*, 284 U.S. 299, 304 (1932),

and so "prescrib[es] greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366 (1983). We turn, then, to the question of successive prosecutions.

The idea underlying the prohibition on successive prosecutions is "that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *Green v. United States*, 355 U.S. 184, 187 (1957). No such abuse has occurred in this case. In the first instance, the State joined all charges against Pinkney in a single multi-count indictment, thus complying with even the broadest interpretation of the guarantee against double jeopardy. *See Ashe v. Swenson*, 397 U.S. at 453-54 (Brennan, J., concurring) (espousing the view that "the Double Jeopardy Clause requires the prosecution . . . to join at one trial all the charges against a defendant that grow out of a single criminal . . . transaction"). In addition, relitigation of the search and seizure issue in the habeas court did not itself constitute an impermissible second prosecution: the habeas proceeding is not initiated by the State, and can in no way be likened to a second attempt to convict the petitioner for a single offense.[13]

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[13] To be sure, had the State brought successive prosecutions against Pinkney, the Double Jeopardy Clause would not permit an issue determined in Pinkney's favor in the first prosecution to be relitigated in a habeas petition arising out of a conviction in the second prosecution. This result, however, follows from the fact that the State would be barred, under

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Finally, relitigation of the search and seizure issue could not subject Pinkney to any additional jeopardy. Had the habeas court affirmed that the search of Pinkney's car was unconstitutional, Pinkney would have been left in no worse a position than if the issue had not been relitigated. However, because he lost on that issue, he will remain in custody under the jury's original verdict of conviction, a permissible result under the Double Jeopardy Clause. *Cf. Wilson*, 420 U.S. at 344-45 (holding that where a conviction is reversed after trial, the Double Jeopardy Clause does not bar a government appeal that, if successful, would only reinstate the conviction and would not subject defendant to a second trial). We therefore conclude that no double jeopardy values were offended by the district court's review of the Appellate Division's suppression order.

It has been suggested that even when collateral estoppel is not required by the Double Jeopardy Clause, it may nonetheless be required by the Due Process Clauses of the Fifth and Fourteenth Amendments. *Compare United States ex rel. DiGiangiemo v. Regan*, 528 F.2d 1262, 1266 (2d Cir. 1975) (dicta) (suggesting that due process may prevent relitigation at trial of an issue decided in defendant's favor at a pretrial hearing), *cert. denied*, 426 U.S. 950 (1976); *Showery v. Samaniego*, 814 F.2d 200, 204 (5th Cir. 1987) (Goldberg, J., dissenting) (due process collateral estoppel should bar relitigation of an issue decided in

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Ashe v. Swenson, from relitigating the issue in the second prosecution. It does not rest on the notion that the habeas proceeding itself triggered any double jeopardy protection.

defendant's favor at bail revocation hearing) *with Showery*, 814 F.2d at 203 ("We are unpersuaded . . . by [defendant's] attempts to erect a due process basis, independent of the double jeopardy clause, for the application of collateral estoppel."). The Supreme Court has discussed, but declined to reach, the question whether collateral estoppel is a due process requirement in state criminal trials. *See Hoag v. New Jersey*, 356 U.S. 464, 471 (1958). Here, too, it is unnecessary to reach that question. When due process is at issue, the critical inquiry is whether the course of proceedings "led to fundamental unfairness." *Id.* at 467. In this case, there is no doubt that the course of proceedings followed a constitutional path. As the district court aptly observed:

> The present habeas corpus application is simply another stage of the same case. It is akin to an appeal by petitioner from the affirmance of the judgment of conviction by the Appellate Division. If the New York Court of Appeals had granted petitioner leave to appeal from the judgment affirming the conviction for murder in the second degree, the Due Process Clause would not have precluded the District Attorney from arguing that the search of the car was valid as an alternative basis for affirmance. There is no reason why the District Attorney should be in a worse position here.

Pinkney v. Keane, 737 F. Supp. at 196. *See Generally* 1 J. Liebman, *Federal Habeas Corpus Practice and Procedure* § 26.2, at 387-88 (1988) (discussing the increased acceptance of the appellate analogy to federal habeas corpus).

In conclusion, we note that collateral estoppel "is essentially a rule of justice and fairness." *Ritchie v.*

Landau, 475 F.2d 151, 155 n.2 (2d Cir. 1973); *see also Commissioners of State Ins. Fund v. Low*, 3 N.Y.2d 590, 595, 170 N.Y.S.2d 795, 798, 148 N.E.2d 136, 138 (1958). Our decision today, that the district court did not err in reviewing the Appellate Division's suppression order, is not an invitation to state prosecutors to reargue in habeas proceedings every state court ruling that favored the petitioner. We hold only that, when a federal district court, on habeas review, has reason to believe that a state appellate court erroneously reversed a state trial court ruling on an issue of federal law that directly bears on the constitutionality of petitioner's conviction, the district court may reexamine that issue in the exercise of its sound judicial discretion.

B. *The Legality of the Search of Appellant's Car.*

Even if the district court's review of the Appellate Division's suppression decision was proper, appellant argues, its conclusion on the merits was erroneous. Specifically, the claim is that Officer Fitzpatrick's initial entry into Pinkney's car constituted a warrantless search supported by neither probable cause nor exigent circumstances, and that it therefore failed to meet the requirements of the automobile exception to the warrant requirement. While we accept petitioner's characterization of Officer Fitzpatrick's initial entry as a search, we reject his claim that this search was unconstitutional.

The question whether the search of appellant's car was supported by probable cause was analyzed at length by the district court. *See Pinkney v. Keane*, 737 F. Supp. at 192-94. We have nothing to add to the district court's

analysis, which we agree with completely. We note only that Pinkney's evasive and false responses to Officer Fitzpatrick when questioned in the emergency room,[14] coupled with the officer's specific knowledge that a felony had just been committed in the neighborhood, argue strongly for a finding of probable cause. *See United States ex rel. Molloy v. Follette*, 391 F.2d 231, 232 (2d Cir.) (probable cause for arrest would be established by officer's reasonable cause to believe that a felony had been committed in the neighborhood, plus defendant's presence on a roof top with access to locus of crime and his "absurd explanation" for his presence there), *cert. denied*, 391 U.S. 917 (1968); *United States ex rel. McCullers v. McMann*, 370 F.2d 757, 758-59 (2d Cir. 1967) (probable cause for arrest established where arresting officers knew that a felony had been committed, and defendant, found near scene of crime, told officers suspicious story). Given the additional circumstances known to Officer Fitzpatrick, including the fact that Pinkney, though bleeding profusely from the leg, had chosen not to drive up to the emergency room but rather to park a block and a half away, we have no doubt that the officer had probable cause to search Pinkney's car.

We also agree with the district court's conclusion that the search of Pinkney's car was constitutional. Assuming that appellant is correct that the existence of probable

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[14] Pinkney told Officer Fitzpatrick that he had been robbed on the Van Wyck service road and that he had walked from there to Jamaica Hospital for treatment. This story was quickly contradicted by the bloody footprints that led not to the Van Wyck service road, but to a parked car a block and a half from the hospital.

cause does not, in and of itself, permit the warrantless search of an automobile absent exigent circumstances, *see Michigan v. Thomas*, 458 U.S. 259, 261 n.2 (1982) (per curiam); *Coolidge v. New Hampshire*, 403 U.S. 443, 458-64 (1971), we find that there was an exigency in this case. In *Cardwell v. Lewis*, 417 U.S. 583 (1974), the Supreme Court found that exigent circumstances existed where a defendant drove to the police station for questioning and was there placed under arrest, after which his vehicle was towed in from a nearby public lot and examined. *See id.* at 593. The police in *Cardwell* had the defendant in custody at the time they seized his car, making it unlikely that he would be able to move the car or its contents. If exigent circumstances were present in *Cardwell*, then they were certainly present in this case, where the defendant lay in an emergency room, only temporarily immobilized by his condition, and it was highly likely that he would, soon upon recovery, drive off. Under these circumstances, the search of Pinkney's car was lawful, and the handguns found as a result of the search were properly admitted at Pinkney's trial.

CONCLUSION

Accordingly, because we are satisfied that appellant's conviction occurred without constitutional violation, we affirm.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MARVIN PINKNEY,

Petitioner,

- against -

JOHN KEANE, etc.,

Respondents.

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MEMORANDUM AND ORDER

89 CV 734 (ERK)

Korman, J.

On October 1, 1981, at approximately 4:45 p.m., Andrew Kalina, the proprietor of a liquor store at 44-24 College Point Boulevard, Queens, New York, was shot to death during an armed robbery. By 6:45 p.m. that same day, the New York City Police had found petitioner, Marvin Pinkney, at Jamaica Hospital receiving medical attention for wounds he incurred while escaping, had recovered the murder weapon from petitioner's car parked a short distance from the hospital, and had brought the four persons who witnessed petitioner's escape from the scene of the crime to the hospital to identify him.

On the basis of this and other compelling evidence, petitioner was convicted of murder in the second degree by a jury sitting in the Supreme Court of the State of New York, Queens County, and he was sentenced to a term of imprisonment of twenty-five years to life. The judgment of conviction was affirmed by the Appellate Division, *People v. Pinkney*, 135 A.D.2d 748, 522 N.Y.S.2d 653 (2nd Dep't 1987), and a motion for leave to appeal to the Court

of Appeals was denied by Judge Simons on May 17, 1988. *People v. Pinkney*, 71 N.Y.2d 1031, 526 N.E.2d 59, 530 N.Y.S.2d 566 (1988).

On appeal from the judgment of conviction, petitioner argued that the trial judge erroneously admitted into evidence the murder weapon that was obtained as a result of the unlawful search of his car. Petitioner also argued that the eyewitness identifications of him at Jamaica Hospital were unnecessarily suggestive and that the eyewitnesses should not have been permitted to testify at trial. Even if the eyewitness testimony was admissible, petitioner argued that the trial judge improperly refused to allow his attorney to comment in his summation on the suggestive nature of the pre-trial identifications.

The Appellate Division agreed with petitioner that the search of his automobile was invalid because it "was neither supported by probable cause nor justified by exigent circumstances or any other exception to the exclusionary rule." *People v. Pinkney*, 135 A.D.2d at 749; 522 N.Y.S.2d at 654 (citations omitted). Although this conclusion resulted in the reversal of petitioner's conviction for the illegal possession of two firearms found in the car, one of which was the murder weapon, the Appellate Division affirmed petitioner's murder conviction on the ground that the eyewitness identifications and other physical evidence that had been properly obtained was so compelling that it rendered the admission of the fruits of the search of the vehicle harmless. *Id.* at 749-50; 522 N.Y.S.2d 654-55. The Appellate Division did not address petitioner's argument that the trial judge had improperly restricted the effort of his attorney to argue to the jury

that the eyewitness identifications were unreliable. The Appellate Division also did not address petitioner's argument that the trial judge erroneously admitted evidence of petitioner's refusal to answer questions after he had been arrested and given his *Miranda* warnings.

Petitioner now seeks habeas corpus relief pursuant to 28 U.S.C. § 2254. While the claims of error he presses, i.e., the admissibility of the eyewitness identifications, the inability of his attorney to attack the reliability of the identifications in his summation and the admissibility of evidence of his post-arrest silence, have substantial merit, there is no need to resolve them here. A careful review of the record indicates that the Appellate Division erred when it concluded that the search of petitioner's automobile was invalid. Because the evidence found in the automobile and other evidence properly admitted renders harmless the errors petitioner alleges were made at trial, the petition must be denied.

Discussion

A. The Validity of the Search of Petitioner's Car

The facts leading to the discovery of the murder weapon in an open leather bag in petitioner's car are set out in the findings of fact made by the trial judge. In pertinent part, they are as follows:

> On October 1, 1981, at approximately 4:45 p.m., Andrew Kalina, the proprietor of a liquor store, at 44-24 College Point Boulevard, Queens, was shot, and died shortly thereafter.
>
> The first police car to arrive on the scene was operated by Police Officer Joseph Costanza

of the 109th Precinct, who was responding to a Robbery in Progress at that location. Upon arriving, he observed that the front door was open with its glass broken, much of it on the outside of the door, and to a lesser extent, some on the inside. He observed that there was a trail of blood leading away from the door for about ten feet onto the street. He also saw the body of Mr. Kalina about twenty feet inside the store, and did not notice any blood in Kalina's vicinity.

Also responding to the scene, as a result of a radio transmission that a man had been shot, was Detective Stanley Struel of the 109th Precinct who observed that the glass of the liquor store door had been shattered. He also observed blood where the shattered glass was. Struel also saw the body of Kalina inside the store. He then notified all hospitals in an effort to determine if anyone could have been seeking treatment for injuries. Subsequently he learned a possible suspect was in Jamaica Hospital and responded there. Detective Richard Ward of the 109th Precinct responded to the location of the liquor store where he noted blood on the sidewalk and on the glass. Detective Ward interviewed witnesses at the scene namely Maurice McFarlane, Kimberly Auffray, and Thierry Auffray. Detective Struel interviewed Leonardo Mesa.

* * *

Another witness to testify was Stanley Zadwydos, who stated that shortly before 5:00 p.m. on October 1, 1981, he was driving on the Interboro Parkway near Queens Boulevard when his car was involved in an accident with a foreign car driven by the defendant. The witness copied the defendant's license plate number. The defendant fled the scene in his car and the witness pursued him. After the defendant's car became stuck in traffic, the witness' car caught up to the

defendant's car. At that point the defendant came face to face with the witness. The witness testified that the defendant stated that he was bleeding and was going directly to a a hospital. The witness attempted to follow the defendant but lost him because the defendant was going at too great a speed. The witness then gave police officers Gerald Goodman and Donald Myerhoff the license number of the car and informed them of the accident. The police ran a check of the license number and stated that the owner was Marvin Pinkney.

At approximately 5:15 p.m., Officers William Fitzpatrick and Thomas McGovern of the 102nd Precinct were told over the police radio to go to the Jamaica Hospital Emergency Room. They were told a description of a perpetrator of a robbery, namely, a male black, dark clothing, dark hat, glasses, and about 6' to 6'2". They were told he might be injured. As they entered the ramp leading to the emergency room of the hospital, they noticed footprints of blood. The officers followed the prints into the emergency room to where a man was being treated for a leg injury. In response to a question by McGovern, he stated he had been mugged by two white men, and had walked to the hospital. McGovern stayed with the defendant who identified himself to McGovern as Marvin Pinkney, while Fitzpatrick followed the trail of blood. While tracing the blood, Fitzpatrick met Officers Goodman and Myerhoff, who informed him that they were looking for a Marvin Pinkney who had left the scene of an accident. Fitzpatrick said he did not know the name Marvin Pinkney. Fitzpatrick traced the trail of blood for about 1-1/2 blocks to a yellow Toyota that had damage to its front and rear. He found the Toyota on a public street with keys laying on the hood of the car. He took the keys. Fitzpatrick noticed that

> the doors were unlocked. He opened the car door and saw a pool of blood inside the car on the driver's side. He then exited the car and looked in the passenger side window. He then noticed an open bag with the handle of a gun protruding out of it. He then opened the car door and seized the bag which he then saw had two guns in it.

Memorandum and Order Denying Defendant's Motion to Suppress Evidence, *People v. Pinkney*, No. 2614/81 (N.Y. Supreme Court October 25, 1982)(Zelman, J.).

Petitioner acknowledges that these findings, "as far as they go, are presumed to be correct." Post-Argument Memorandum of Law, *People v. Pinkney*, No. 89-734 (E.D.N.Y. June 23, 1989)(hereinafter "Post-Argument Memorandum") at 10 (citing 28 U.S.C. § 2254(d)). The one fact that is conceded to have been omitted by the trial judge in her findings of fact is that Officer Fitzpatrick first observed the bag containing the guns while he was inside the car. Specifically, Officer Fitzpatrick testified that he observed a brown leather bag "on the passenger side of the rear on the floor" as he "was starting to back out of the car." Transcript of *Mapp* Hearing, *People v. Pinkney*, No. 2614/81 (N.Y. Supreme Court, April 14, 1982 and October 12, 1982)(hereinafter "Tr.") at 61. Officer Fitzpatrick then got out of the car and "went around to the passenger side and looked through the window." *Id.* At that point, he "could see the handle of a gun protruding from the bag." *Id.* Although Officer Fitzpatrick's initial entry into the automobile enabled him to see no more than was visible through the window of the unlocked automobile, petitioner alleges that his entry into the vehicle was a "search" within the meaning of the Fourth

Amendment. Petitioner argues that, in the absence of a warrant or probable cause, Officer Fitzpatrick's observation of the leather bag was the fruit of an impermissible search.

While petitioner's characterization of the entry into the vehicle as a search may be correct, *New York v. Class*, 475 U.S. 106, 114-15 (1986), this alone does not entitle petitioner to prevail. It is well-established that a warrantless search of an automobile is permissible if based on probable cause. *See e.g. Michigan v. Thomas*, 458 U.S. 259, 261 (1982)("[T]he justification to conduct such a warrantless search does not vanish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant.")(footnote and citation omitted); *see also California v. Carney*, 471 U.S. 386 (1985); *Cardwell v. Lewis*, 417 U.S. 583 (1974).

Petitioner's reliance upon the Supreme Court's holding in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), is misplaced. In *Coolidge*, a warrantless search of a vehicle was invalidated because the police entered "private property to seize and search an unoccupied, parked vehicle not then being used for an illegal purpose." *Id.* at 463 n.20. The Supreme Court has never applied the holding in *Coolidge* beyond its facts and, if it survives today at all, it stands as authority for the narrow proposition that a warrant is required to search an automobile only where entry on to private property is necessary to effectuate the search. *See Cardwell v. Lewis*, 417 U.S. at 593; *United States v. Bagley*, 772 F.2d 482 (9th Cir. 1985), *cert. denied*, 475 U.S.

1023 (1986); *United States v. McBee*, 659 F.2d 1302, 1305 n.5 (5th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982); 3 LaFave, *Search and Seizure* § 7.2(b), at 39 (1987).

Accordingly, the threshold issue in assessing the reasonableness of Officer Fitzpatrick's "search" of petitioner's car is whether there was probable cause to believe that petitioner had committed an armed robbery and that weapons or the proceeds of the robbery would be found in a vehicle that petitioner had hastily abandoned in order to seek medical care for wounds incurred during the commission of the offense.

Probable cause is not the equivalent of a prima facie case. *Illinois v. Gates*, 462 U.S. 213, 235 (1983). Rather, it requires only facts sufficient to " 'warrant a man of reasonable caution in the belief' " that evidence of a crime will be found in the place to be searched; "it does not demand any showing that such a belief be correct or more likely true than false." *Texas v. Brown*, 460 U.S. 730, 742 (1983) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)). As the Supreme Court has repeatedly emphasized:

> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. . . . The rule of probable cause is a practical, nontechnical conception. . . .

Brinegar v. United States, 338 U.S. 160, 175-76 (1949).[1]

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[1] "The probable cause test . . . is an objective one; for there to be probable cause, the facts must be such as would warrant

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The test for probable cause was satisfied here. After arriving at the scene of the crime, it immediately became apparent to the New York City Police that the perpetrator of the robbery was seriously injured in making his escape and that he would likely seek medical attention at nearby hospitals. Petitioner was admitted to Jamaica Hospital less than thirty minutes after the robbery. Officer Fitzpatrick, who was then dispatched to Jamaica Hospital, received two messages on his car radio prior to arriving at Jamaica Hospital. The first advised him to investigate an "aided at Jamaica Hospital." Tr. at 50. An "aided" meant that there was "an injured party at Jamaica Hospital" and he was "to find out the cause of the injury." *Id.* Officer Fitzpatrick understood that such an investigation is normally instigated by hospital authorities because "they consider it suspicious and the hospital calls the precinct." *Id.*

Subsequently, before Officer Fitzpatrick arrived at Jamaica Hospital, the dispatcher got back "on the air and

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a belief by 'a prudent man,' 'a man of reasonable caution,' or 'a reasonable discrete and prudent man.' . . . [I]f the objective probable cause test is met it is not also necessary to establish that the particular officer making the arrest or search subjectively believed probable cause was present." 1 LaFave and Israel, *Criminal Procedure* § 3.3, at 188 (1984)(footnotes omitted); *see Maryland v. Macon*, 472 U.S. 463, 470-71 (1985); *United States v. Roy*, 869 F.2d 1427, 1432-33 (11th Cir.), *cert. denied*, 107 S. Ct. 72 (1989); *United States v. Gray*, 659 F.2d 1296, 1300 (5th Cir. 1981). Accordingly, the inability of Officer Fitzpatrick to say what he was looking for when he opened the door to the car, Tr. 739-43, is not material to the issue of whether there was probable cause to search the car.

told us to use caution, that the aided might have been involved with an armed robbery in the 109th." *Id.* at 51. The dispatcher gave a description of the perpetrator and Officer Fitzpatrick also recalled being asked to check "about broken glass." *Id.* When he arrived at the entrance to the emergency room of the hospital, Officer Fitzpatrick noticed blood-stained footprints on the ramp that led into the emergency room where petitioner was being treated for a serious wound in the leg. *Id.* at 52.

Petitioner then told Officer Fitzpatrick that he had been robbed by two white men on the Van Wyck service road and that he had walked from there to Jamaica Hospital for treatment. *Id.* at 54-55. Officer Fitzpatrick suspected that petitioner was not telling the truth because petitioner's statement that "he came down the Van Wyck Expressway service road and into the emergency room" was not consistent with his observation of the direction from which the footprints appeared to be coming. *Id.* at 724. Specifically, "when he originally entered the emergency room," Officer Fitzpatrick "noticed the blood prints coming through the parking lot. From another direction." *Id.*

Officer Fitzpatrick then left petitioner and began retracing the path created by the blood-stained footprints. He found that they led to a car parked a block and a half from the hospital on 91st Avenue and 135th Street. *Id.* at 58. When he "looked into the car through the window," Officer Fitzpatrick "could see a pool of blood on the driver's side." *Id.* at 58-59. This confirmed his suspicion that petitioner had lied about the location of the alleged robbery and that he had walked to Jamaica Hospital from where he was attacked. Even petitioner concedes that it

was reasonable for Officer Fitzpatrick to then conclude that petitioner "had given the police a false explanation for his injury." Post-Argument Memorandum at 17.

Moreover, the fact that petitioner parked his car a block and a half away, rather then drive directly to the entrance of Jamaica Hospital, raised additional doubts about the cause of petitioner's injury. A reasonable police officer could assume that there was something about the car or its contents that petitioner thought would be discovered if he drove the car to the door of the emergency room in his bloodied condition. Indeed, the Appellate Division cited the fact that petitioner "parked his car two blocks from the hospital and walked to the emergency room, although bleeding profusely from the leg," as evidence demonstrating consciousness of guilt. *People v. Pinkney*, 135 A.D.2d at 750; 522 N.Y.S.2d at 655.

Petitioner maintains, however, that an apparently false explanation for an injury given by a patient in an emergency room is not enough to establish probable cause. This argument ignores the fact that petitioner's explanation, besides being false, constituted present evidence of "consciousness of wrongdoing." Post-Argument Memorandum at 17. When this is "coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime," *Sibron v. New York*, 392 U.S. 40, 66 (1968), there is probable cause to search.

The record is replete with "specific knowledge" linking petitioner to "evidence of crime." The armed robbery that petitioner was suspected of committing took place only three and a half miles from Jamaica Hospital. Petitioner sought treatment there for a badly bleeding cut on

his leg less than thirty minutes after the perpetrator of the armed robbery fled the scene of the crime, cut by glass and bleeding profusely. While Officer Fitzpatrick did not know the basis for the information he had received, that petitioner "might have been involved in an armed robbery in the 109th," there was a factual basis for that information and, hence, he was entitled to rely on it. *United States v. Hensley*, 469 U.S. 221, 229-33 (1985); *United States v. Robinson*, 536 F.2d 1298, 1299-1300 (9th Cir. 1976). Accordingly, when he encountered petitioner, who fit the general physical description or the suspect,[2] he could assume that there was reason to believe that petitioner had committed an armed robbery. Just as a credible explanation at that point would have eliminated any suspicion, an explanation that was contradicted by the available evidence aroused suspicion and confirmed that petitioner was the suspect that Officer Fitzpatrick was sent to Jamaica Hospital to find.

Two Court of Appeals' cases illustrate when an explanation not found to be credible by a police officer will give rise to probable cause. In *United States ex rel. Molloy v. Follette*, 391 F.2d 231, 232 (2d Cir.), *cert. denied*,

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[2] Officer Fitzpatrick was not asked at the suppression hearing whether petitioner fit the description that had come over the radio or whether he had seen the clothing petitioner was wearing when he was admitted to the hospital. There is no dispute that petitioner fit the general description of a black male, about six feet or six feet two inches tall. Furthermore, petitioner testified that his clothes, which likewise fit the description, were on a chair near the bed on which he was being treated, Tr. at 798, 816-17, and they clearly would have been visible to Officer Fitzpatrick.

391 U.S. 917 (1968)(Friendly, J.), the arresting officer, Detective Gagliardi, received a call on his car radio to proceed to 871 Flatbush Avenue "where there were prowlers." At some point after he arrived, he saw Molloy on the roof of 12 Martense Street, one hundred feet north of 871 Flatbush Avenue.

> Somehow Gagliardi got to the roof of 12 Martense St. and asked Molloy what he was doing there. Molloy responded that he had had a fight on the street, and, to get away from his assailants, had gone to the roof "to find a place to sleep." Finding this explanation not wholly convincing, Gagliardi "took him * * * down into the street" and questioned him again. When this produced the same answers, Gagliardi placed Molloy under arrest, searched him and seized a registration for a 1957 Oldsmobile with plates numbered AD 5717. He then "searched the area and found one John Herbert Smith secreted under the front dashboard of an automobile parked in front of 12 Martense Street," with license plates of the same number.

Id. at 232 (footnote omitted).

In addressing the issue of probable cause, Judge Friendly observed that:

> [I]f Detective Gagliardi had reasonable cause to believe that a felony had been committed at 12 Martense St., 871 Flatbush Ave., or elsewhere in the neighborhood, at least if there was possible access between the locus of the crime and the place where Molloy was found, Molloy's presence on a roof top and his absurd explanation gave sufficient reason for believing he had committed the crime to justify his arrest.

Id. at 232-33. Because the record was silent on this issue, the case was remanded to give the State "an opportunity to cure this deficiency, e.g., by furnishing further evidence of what burglary had been reported and where and when, and the physical relationship of the locus to 12 Martense St." *Id.* at 233 (footnote omitted). By contrast, the facts found critical by Judge Friendly to establish probable cause are present in the record here. Before Office Fitzpatrick followed petitioner's bloody footprints to his car, the New York City Police knew when and where the armed robbery occurred in relation to when and where petitioner was found. Petitioner's presence at the hospital and the evidence of consciousness of guilt sufficiently tied him to that crime to establish probable cause.

Certainly, the facts here are stronger than those in *United States ex rel. McCullers v. McMann*, 370 F.2d 757 (2nd Cir. 1967). In *McCullers*, the Court of Appeals held that there was probable cause to arrest a defendant who was waiting for a bus a few blocks from the scene of a late evening burglary and who told the arresting officer he had been playing poker with persons he could not name. Particular emphasis was placed on the fact "that the police officers knew that a felony had been committed. They were not proceeding merely on the basis of the suspicious circumstances in which the appellant was found." *Id.* at 759. This is precisely the case here.

Even if Officer Fitzpatrick possessed only reasonable suspicion and not probable cause, it is not entirely clear that his inspection of petitioner's car was unreasonable. Petitioner had left his car unlocked on a public street, where it was subject to being vandalized while he

received emergency medical care. A cursory inspection of the vehicle to ensure that there were no weapons or evidence that might be stolen or removed would not appear to be unreasonable where the intrusion was minimal and only in an area in which petitioner had manifested a limited expectation of privacy. Indeed, because this case involves an unlocked and unoccupied vehicle left in a public place, the invasion of privacy here was much less significant than in *New York v. Class*, 475 U.S. 106, 119 (1986), which involved an entry into a vehicle that had been driven by its owner when it was stopped for a traffic infraction.[3]

While the Supreme Court has yet to uphold a search on reasonable suspicion "merely because it was minimally intrusive," *United States v. Colyer*, 878 F.2d 469, 479 (D.C. Cir. 1989), the minimal nature of an intrusion is obviously of considerable significance in determining the reasonableness of a search. *See United States v. D'Avanzo*, 443 F.2d 1224, 1226 (2d Cir.), *cert. denied*, 404 U.S. 850 (1971). This consideration, along with the possibility that weapons might have been left in the car, arguably brings this case within the narrow exception permitting a search even in the absence of probable cause to believe that evidence of a crime or contraband would be found. *See*

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[3] The record in *Class* "reveal[ed] no reason for the officer to suspect other criminal activity or to act to protect his own safety. The sole predicate for the officer's action here was defendant's commission of an ordinary traffic infraction. . . ." *People v. Class*, 63 N.Y.2d 491, 496, 472 N.E.2d 1009, 1012, 483 N.Y.S.2d 181, 184 (1984) (citations omitted).

Cady v. Dombrowski, 413 U.S. 433 (1973);[4] *Cf. Arizona v. Hicks*, 480 U.S. 321, 327 (1987) (Seizure can be justified on less than probable cause "where, for example, the seizure is minimally intrusive and operational necessities render it the only practicable means of detecting certain types of crime."); *United States v. Prazak*, 500 F.2d 1216, 1217 (9th Cir. 1974) (Police officer's act in opening locked trunk of car to put in a coat removed from the rear seat was justified as a reasonable means of securing the automobile and its contents). Because this issue was not addressed by the parties and because there was probable cause for the search, it is not necessary or appropriate to decide the case on this ground.[5]

Even if the Appellate Division erroneously concluded that the search of his car violated the Fourth Amendment, petitioner argues that the District Attorney is collaterally estopped from relitigating the validity of the search of the automobile. This argument is without merit. The application of the doctrine of collateral estoppel is not required

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[4] In *Cady v. Dombrowski, supra*, there was probable cause to believe that there was a weapon in the car. Because the defendant was an off-duty police officer who was lawfully in possession of the weapon, "the search could not be explained as a search for evidence or contraband" of the kind that would be justified under the automobile search exception. Saltzberg, *American Criminal Procedure* 274-75 (1988).

[5] Similarly, because testimony at the suppression hearing did not develop a factual basis for the application of the inevitable discovery exception to the exclusionary rule, it is not appropriate to rule on the issue of whether the weapons ultimately would have been lawfully seized even if Office Fitzpatrick had not entered the vehicle when he did.

here by considerations of comity or by the Due Process Clause.

Under New York law, a party who has obtained a final judgment in its favor is not normally precluded from relitigating a subsidiary issue that was decided against it. As Professor Siegel has observed in explaining the predicament in which such a party finds itself:

> What could he do when the court found against him on that issue? He apparently could not appeal, because final judgment nonetheless went in his favor. As the winner, H would presumably lack aggrieved status sufficient to take an appeal, with the result that the adverse finding . . . would stand against him without his being able to secure appellate review.

Siegel, *New York Practice* 615 (1978). Professor Siegel suggests that such a result is unacceptable in New York:

> A full day in court in New York practice includes the appellate process if the loser wants it, and a situation in which appeal is foreclosed can thus be regarded as an inadequate day in court. The Restatement takes that position, too, holding that the estoppel will not apply against a person who could not have obtained appellate review of the judgment. Perhaps the logical denouement here is that an estoppel will not operate on any issue which was decided against the winner in the first action.

Id. at 615-16 (footnote omitted).

While Professor Siegel was speaking in the context of a civil case, a similar analysis has been applied in criminal cases in which this issue sometimes arises, i.e., where a defendant prevails at a suppression hearing at a trial for bank robbery and is subsequently indicted for stealing a

getaway car.[6] In such a case, as Judge Friendly has written:

> Assuming that the state has had an opportunity for a full hearing on suppression and at least one appeal as of right, we think due process would forbid relitigation of the issue determined adversely to it, although not, of course, the prosecution of X for auto theft on the basis of other evidence.

United States ex rel. DiGiangiemo v. Regan, 528 F.2d 1262, 1266 (2d Cir. 1975), *cert. denied sub nom. DiGiangiemo v. Olgiatti*, 426 U.S. 950 (1976).

Because the District Attorney prevailed here in sustaining petitioner's conviction for murder in the second degree, he could not appeal from the judgment affirming the conviction on the ground that the Appellate Division erred in its finding on the subsidiary issue regarding the validity of the search of the car. The Appellate Division did reverse the conviction of petitioner for illegal possession of the weapons found in the automobile. The District Attorney, however, had no reason to seek leave to appeal from that decision because the sentence ran concurrently with the 25 years to life sentence for the murder conviction that was affirmed.[7] For that very reason it is unlikely

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[6] The New York Court of Appeals has not been sympathetic to the application of the doctrine of collateral estoppel in criminal cases. *See e.g. People v. Plevy*, 52 N.Y.2d 58, 65 n.4, 417 N.E.2d 518, 522 n.4, 436 N.Y.S.2d 224, 228 n.4 (1980).

[7] A determination of whether the first action or proceeding genuinely provided a full and fair opportunity requires

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that the New York Court of Appeals would have granted such a leave application.

More significantly, the present case is different from the hypothetical that Judge Friendly was addressing in *DiGiangiemo*. There, it was the District Attorney who initiated a second criminal prosecution arising out of the same nucleus of facts as the first prosecution. Under these circumstances, the Due Process Clause was thought to preclude relitigation of the issue of the admissibility of evidence that had been decided adversely to the District Attorney in the earlier proceeding.

The present habeas corpus application is simply another stage of the same case. It is akin to an appeal by petitioner from the affirmance of the judgment of conviction by the Appellate Division. If the New York Court of Appeals had granted petitioner leave to appeal from the judgment affirming the conviction for murder in the second degree, the Due Process Clause would not have precluded the District Attorney from arguing that the search of the car was valid as an alternative basis for affirmance. There is no reason why the District Attorney should be in a worse position here.

The same discretion implicit in the statutory command that the judge "dispose of the matter as law and

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consideration of "the 'realities of the [prior] litigation,' including the context and other circumstances which . . . may have had the practical effect of discouraging or deterring a party from fully litigating the determination which is now asserted against him." *People v. Plevy*, 52 N.Y.2d 58, 65, 417 N.E.2d 518, 522, 436 N.Y.S.2d 224, 228 (1980) (citations omitted).

justice require," 28 U.S.C. §2243; *Stone v. Powell*, 428 U.S. 465, 478 n.11 (1976), and that permits the denial of habeas corpus relief in a case in which the Appellate Division has erroneously determined that the Fourth Amendment was *not* violated, *Stone v. Powell*, 428 U.S. at 477-82, surely permits the denial of habeas corpus relief where one of the predicates for that relief is an erroneous finding by the Appellate Division that the Fourth Amendment *was* violated. Indeed, because the considerations underlying the doctrine of collateral estoppel are less compelling in criminal cases, "where the pre-eminent concern is to reach a correct result and where other considerations peculiar to the criminal process may outweigh the need to avoid repetitive litigation," *People v. Plevy*, 52 N.Y.2d 58, 64, 417 N.E.2d 518, 521-22, 436 N.Y.S.2d 224, 227-28, it is particularly appropriate to exercise the discretion vested by 28 U.S.C. §2243 to decline to preclude the District Attorney from arguing that the judgment of conviction should be sustained on the ground that the Appellate Division erroneously decided that the Fourth Amendment was violated.

B. The Effect of the Other Errors Alleged By Petitioner

The evidence against petitioner established his guilt beyond a shadow of a doubt. This evidence, aside from the murder weapon found in his car, is summarized in the opinion of the Appellate Division:

> Four witnesses testified at the trial that they were in the parking lot of a shopping mall when they heard the glass door of a liquor store shatter and saw a man, later identified as the defendant, running out of the store. All had a good

opportunity to view this man, were able to see his face, and later gave police rather detailed descriptions of this man and of his clothing. One of these witnesses saw the man putting something inside his coat (the others simply saw him with his hand inside his coat) and watched him get into a car and drive off. Several of the witnesses then walked over to the store and saw blood and a man lying on the floor inside. The man on the floor was Andrew Kalina, and he had been shot dead by a .22 caliber bullet. A second, deformed .22 caliber bullet was also found next to Kalina. A fifth witness testified that on the day of the incident he was in his apartment above the liquor store when he heard two gunshots followed by the sound of breaking glass. He went downstairs and found Kalina lying on the floor of the liquor store.

Shortly after this incident, the original four witnesses were brought by police to a hospital where three of them identified the defendant as the man they had seen running from the liquor store and also identified various articles of his clothing as those worn by the man that they had seen. The fourth witness identified certain of the defendant's physical features and certain articles of his clothing as similar to those of the man at the liquor store. One of these witnesses also identified the defendant's car, which was parked outside, as the one in which the man at the scene of the crime had driven away. Yet another witness, who had been involved in a hit-and-run accident with the defendant when the defendant was driving himself to the hospital and who was able to get the license number of the defendant's car and report the incident to the police, was also brought to the hospital by the police and was able to identify the defendant and his car. Other admissable evidence linking the defendant to the crime of murder in

> the second degree was that the blood samples found on the glass fragments of the liquor store's door and on the defendant's car and clothing were genetically consistent with each other but not with a sample of Kalina's blood, and that the genetic factors found in this blood occur in only 6% of the population. Finally, the defendant's behavior itself demonstrated consciousness of guilt. For instance, he parked his car two blocks away from the hospital and walked to the emergency room, although he was bleeding profusely from the leg. Moreover, his responses to police questioning at the hospital concerning his injury were evasive and false. He denied owning a car and having just been involved in an accident, and claimed that he had walked to the hospital after being mugged nearby, but could not give many details about the mugging.

People v. Pinkney, 135 A.D.2d at 749-50, 522 N.Y.S.2d at 654-55.

When added to this record is evidence that the murder weapon was found in petitioner's automobile, which he used to make his escape and which he drove to Jamaica Hospital to seek treatment within thirty minutes of the robbery, it is plain that any restriction on the ability of petitioner's attorney to comment on the suggestive nature of the pre-trial identifications at Jamaica Hospital and any error in allowing testimony about petitioner's post-arrest silence could not have affected the verdict and was harmless beyond a reasonable doubt.

While petitioner challenges the admissibility of the eyewitness identifications upon which the Appellate Division relied, the evidence of his guilt is so overwhelming that any error involved in admitting that evidence is

harmless as well.[8] In so concluding, I recognize that there is some uncertainty over the application of the harmless error rule. The Supreme Court's early decisions "looked not to whether the jury would have convicted without regard to the error, . . . but to whether the error had influenced the jury in reaching its verdict." 3 LaFave and Israel, *Criminal Procedure* §26.6, at 279 (1984); *Chapman v. California*, 386 U.S. 18 (1967); *Fahy v. Connecticut*, 375 U.S. 85 (1963). Subsequent cases appear to support an application of the harmless error rule that focuses on the issue of whether the untainted evidence is so overwhelming that a jury would have convicted without the tainted evidence. 3 LaFave and Israel, *supra*, at 280-81; *Milton v. Wainwright*, 407 U.S. 371 (1972); *Schneble v. Florida*, 405 U.S. 427 (1972); *Harrington v. California*, 395 U.S. 250 (1969). *See also Delaware v. Van Arsdale*, 475 U.S. 673, 684 (1986).

While the difference in these two formulations may not be of practical significance in most cases, the latter approach seems particularly appropriate where, as here, the only purpose of the rule requiring the exclusion of erroneously admitted evidence is "truth-furthering."

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[8] The Appellate Division held "that, under the totality of the circumstances, the procedures employed were not so unnecessarily suggestive as to be conducive to an irreparably mistaken identification." *People v. Pinkney*, 135 A.D.2 at 748; 522 N.Y.S. 2d at 654. While the issue is a close one, the identifications that took place at Jamaica Hospital are of a kind similar to the "prompt-on-the-scene confrontation" that "does not offend the principles established in *United States v. Wade*, 388 U.S. 218 (1967)." *United States ex rel. Cummings v. Zelker*, 455 F.2d 714, 716 (2d Cir.), *cert. denied*, 406 U.S. 927 (1972); *See* Saltzberg, *American Criminal Procedure* 595 (1988)

Stacy and Dayton, *Rethinking Harmless Constitutional Error*, 88 Colum. L. Rev. 79, 92 (1988). Evidence of the kind at issue is excluded if it was obtained in a manner that would create a very substantial likelihood of mistaken identification.[9] Chief Judge Oakes put it well in *Kampshoff v. Smith*, 698 F.2d 581 (2d Cir. 1983):

> There can be no reasonable doubt that inaccurate eyewitness testimony may be one of the most prejudicial features of a criminal trial. Juries, naturally desirous to punish a vicious crime, may well be unschooled in the effects that the subtle compound of suggestion, anxiety, and forgetfulness in the face of the need to recall often has on witnesses. Accordingly, doubts over the strength of the evidence of a defendant's guilt may be resolved on the basis of the eyewitness' seeming certainty when he points to the defendant and exclaims with conviction that veils all doubt, "[T]hat's the man!"

Id. at 585 (footnote and citation omitted).

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[9] The purpose of this rule is different from the rule excluding coerced confessions. Such confessions are excluded even where reliability is not an issue because the methods used to obtain them are offensive. *Spano v. New York*, 360 U.S. 315, 320-21 (1959); *see Miller v. Fenton*, 474 U.S. 104, 109 (1985) ("[C]ertain interroga-tion techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment."). Accordingly, there is a basis for applying the harmless error rule in a different way where a coerced confession has been erroneously admitted into evidence. *See Spano v. New York*, 360 U.S. at 324; *see also* Stacy and Dayton, *supra*, at 95-98, 101-104.

As Professors Stacy and Dayton have recently observed in discussing the application of the harmless error rule to the erroneous admission of evidence in violation of rights "whose only purpose is truth-furthering:"

> These rights operate to protect innocent persons from wrongful conviction; they relate to the premise that "it is far worse to convict an innocent man than to let a guilty man go free," and foster confidence that criminal convictions will fall only on those who are actually guilty. The purpose of a truth-furthering right is not frustrated in a particular case if, despite the error, the record as a whole conclusively demonstrates the defendant's guilt or at least demonstrates that the violation could have had no effect on the jury's decision to convict. Truth-furthering rights would thus seem to be ideally suited for *Chapman*'s harmless error rule, which ensures reversal of the conviction when reliability may have been impaired, but requires affirmance when the court is substantially certain that the constitutional error did not undermine reliability.

Stacy and Dayton, *supra*, at 92 (footnotes omitted). Where the untainted evidence overwhelmingly establishes guilt and confirms the reliability of the eyewitness identification, and where it is plain that a jury would have convicted even absent the eyewitness identification, there appears to be no reason of policy to reverse the judgment of conviction. *See Boyd v. Henderson*, 555 F.2d 56, 62 (2d Cir.), *cert. denied*, 434 U.S. 927 (1977) (impermissible

identification is harmless where defendant would have been convicted without such evidence.)[10]

Conclusion

The petition for a writ of habeas corpus is denied and petitioner is granted a certificate of probable cause pursuant to 28 U.S.C. §2253.

SO ORDERED:

/s/ _____
EDWARD R. KORMAN, U.S.D.J.

Dated: Brooklyn, New York
May 10, 1990

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[10] In *United States ex rel. Cummings v. Zelker, supra,* the Court of Appeals cited the evidence corroborating the defendant's guilt, among other factors, in concluding that an improperly obtained post-arrest identification "did not taint the witness' testimony nor infect the trial." 455 F.2d at 717.

The PEOPLE, etc., Respondent,

v.

Marvin PINKNEY, Appellant.

Supreme Court, Appellate Division,
Second Department.

Dec. 21, 1987.

Before BRACKEN, J.P., and RUBIN, EIBER and SPATT, JJ.

MEMORANDUM BY THE COURT.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Zelman, J.), rendered December 20, 1982, convicting him of murder in the second degree, criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing, of that branch of the defendant's omnibus motion which was to suppress physical evidence and identification testimony.

ORDERED that the judgment is modified, on the law and the facts, by reversing the defendant's convictions of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree, vacating the sentences imposed thereon, granting that branch of the defendant's motion which was to suppress certain physical evidence, and dismissing those counts of the indictment; as so modified, the judgment is affirmed.

As part of his omnibus motion, the defendant challenged the propriety of a police-arranged show up procedure which resulted in positive identifications by four

witnesses to the crimes. We agree with the hearing court that, under the totality of the circumstances, the procedures employed were not so unnecessarily suggestive as to be conducive to an irreparably mistaken identification. Therefore, that branch of the defendant's omnibus motion which was to suppress this evidence was properly denied (*see, e.g., People v. Logan*, 25 N.Y.2d 184, 303 N.Y.S.2d 353, 250 N.E.2d 454, *cert. denied* 396 U.S. 1020, 90 S.Ct. 592, 24 L.Ed.2d 513, *rearg. dismissed* 27 N.Y.2d 733, 314 N.Y.S.2d 542, 262 N.E.2d 680, *rearg. denied*, 27 N.Y.2d 737, 314 N.Y.S.2d 1029, 262 N.E.2d 683; *People v. Smith*, 46 A.D.2d 639, 360 N.Y.S.2d 256, *aff'd.* 38 N.Y.2d 882, 382 N.Y.S.2d 745, 346 N.E.2d 546; *People v. Digiosaffatte*, 63 A.D.2d 703, 404 N.Y.S.2d 879, citing *Neil v. Biggers*, 409 U.S. 188, 193, 93 S.Ct. 375, 379, 34 L.Ed.2d 401).

The defendant further sought to suppress two guns which had been seized by the police as a result of a warrantless search of his vehicle. Under the facts of this case, the search was neither supported by probable cause nor justified by exigent circumstances or any other exception to the exclusionary rule (*see, e.g., Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564; *People v. Martin*, 48 A.D.2d 213, 216, 368 N.Y.2d 342; *see also, Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419; *Matter of Kwok T.*, 43 N.Y.2d 213, 401 N.Y.S.2d 52, 371 N.E.2d 814). Accordingly, the convictions for criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree are reversed.

However, the improper admission of the guns into evidence does not mandate reversal of the conviction for

murder in the second degree since the admission in evidence of the murder weapon was harmless error in view of the other overwhelming evidence on that charge. Four witnesses testified at the trial that they were in the parking lot of a shopping mall when they heard the glass door of a liquor store shatter and saw a man, later identified as the defendant, running out of the store. All had a good opportunity to view this man, were able to see his face, and later gave police rather detailed descriptions of this man and of his clothing. One of these witnesses saw the man putting something inside his coat (the others simply saw him with his hand inside his coat) and watched him get into a car and drive off. Several of the witnesses then walked over to the store and saw blood and a man lying on the floor inside. The man on the floor was Andrew Kalina, and he had been shot dead by a .22 caliber bullet. A second, deformed .22 caliber bullet was also found next to Kalina. A fifth witness testified that on the day of the incident he was in his apartment above the liquor store when he heard two gunshots followed by the sound of breaking glass. He went downstairs and found Kalina lying on the floor of the liquor store.

Shortly after this incident, the original four witnesses were brought by police to a hospital where three of them identified the defendant as the man they had seen running from the liquor store and also identified various articles of his clothing as those worn by the man that they had seen. The fourth witness identified certain of the defendant's physical features and certain articles of his clothing as similar to those of the man at the liquor store. One of these witnesses also identified the defendant's car, which was parked outside, as the one in which the man at

the scene of the crime had driven away. Yet another witness, who had been involved in a hit-and-run accident with the defendant when the defendant was driving himself to the hospital and who was able to get the license number of the defendant's car and report the incident to the police, was also brought to the hospital by the police and was able to identify the defendant and his car. Other admissable evidence linking the defendant to the crime of murder in the second degree was that the blood samples found on the glass fragments of the liquor store's door and on the defendant's car and clothing were genetically consistent with each other but not with a sample of Kalina's blood, and that the genetic factors found in this blood occur in only 6% of the population. Finally, the defendant's behavior itself demonstrated consciousness of guilt. For instance, he parked his car two blocks away from the hospital and walked to the emergency room, although he was bleeding profusely from the leg. Moreover, his responses to police questioning at the hospital concerning his injury were evasive and false. He denied owning a car and having just been involved in an accident, and claimed that he had walked to the hospital after being mugged nearby, but could not give many details about the mugging.

In conclusion, we believe that this is an appropriate case to apply the harmless error doctrine since there was overwhelming evidence of the defendant's guilt of murder in the second degree and since it cannot be said that there is any reasonable possibility that the improper admission of the murder weapon contributed to that conviction (*see, People v. Crimmins*, 36 N.Y.2d 230, 367 N.Y.S.2d 213, 326 N.E.2d 787).

MEMORANDUM

SUPREME COURT QUEENS COUNTY

CRIMINAL TERM, PART J7

THE PEOPLE OF THE STATE OF NEW YORK, VS. MARVIN PINKNEY, Defendant.	By MARTHA K. ZELMAN, J.S.C. DATED OCTOBER 13, 1982 INDICTMENT NUMBER 2614/81

INTRODUCTION

Defendant, charged with Murder in the Second Degree, Criminal Possession of a Weapon in the Second Degree, and Criminal Possession of a Weapon in the Third Degree, moves pre-trial to suppress identification testimony, physical evidence, and statements made by the defendant.

A combined Wade-Mapp-Huntley Hearing was commenced on April 14, 1982, and continued on April 15, 1982, April 28, 1982, May 20, 1982, June 2, 1982, June 30, 1982 and October 12, 1982. Based upon the credible evidence adduced at the hearing, the court makes the following Findings of Fact and reaches the following Conclusions of Law.

FINDINGS OF FACT

On October 1, 1981, at approximately 4:45 P.M., Andrew Kalina, the proprietor of a liquor store, at 44-24

College Point Boulevard, Queens, was shot, and died shortly thereafter.

The first police car to arrive on the scene was operated by Police Officer Joseph Costanza of the 109th Precinct, who was responding to a Robbery in Progress at that location. Upon arriving, he observed that the front door was open with its glass broken, much of it on the outside of the door, and to a lesser extent, some on the inside. He observed that there was a trail of blood leading away from the door for about ten feet onto the street. He also saw the body of Mr. Kalina about twenty feet inside the store, and did not notice any blood in Kalina's vicinity.

Also responding to the scene, as a result of a radio transmission that a man had been shot, was Detective Stanley Struel of the 109th Precinct who observed that the glass of the liquor store door had been shattered. He also observed blood where the shattered glass was. Struel also saw the body of Kalina inside the store. He then notified al hospitals in an effort to determine if anyone could have been seeking treatment for injuries. Subsequently he learned a possible suspect was in Jamaica Hospital and responded there. Detective Richard Ward of the 109th Precinct responded to the location of the liquor store where he noted blood on the sidewalk and on the glass. Detective Ward interviewed witnesses at the scene namely Maurice McFarlane, Kimberly Auffray, and Thierry Auffray. Detective Struel interviewed Leonardo Mesa.

Mr. McFarlane, a witness, stated he heard some glass breaking and saw someone stumble out of the doorway of the liquor store. That person ran past where McFarlane

was standing, and passed within eight feet of him at the closest point. McFarlane did not see whether that person was bleeding, but described the perpetrator as a black man with a fair complexion, a beard, mustache, funny looking pants, grayish squire hat and a 3/4 length jacket. Though he saw his face, he did not remember whether he was wearing glasses. McFarlane then observed that person disappear around the corner.

Kimberly Auffray testified she heard some glass breaking and then saw some black man come out of the liquor store. He walked down the sidewalk, and was only about eight feet from her at the closest point. She got a good look at him in particular, she noticed that he had a build similar to that of her husband, tall and thin, with a light complexion, had a shiny vinyl imitation coat, hat and thick-rimmed glasses, as well as dark boots. She also saw blood on the front door glass.

Thierry Auffray, the husband of Kimberly Auffray, stated that he heard some glass breaking and then saw a man walking out of the liquor store towards him. The man came within five feet of Thierry Auffray, and he got a good look at him. The man was walking fast. He was described as a black man, wearing a 3/4 length coat, with boots, hat and glasses. Ho noticed glass outside the front door with blood right where the glass was.

Leonardo Mesa stated that after he heard glass break, he saw a man come running out of the liquor store. This man passed within two feet of Mesa. He believed the man put a weapon away. The man was described as having a black hat and black jacket. The witness didn't see the

glasses but saw the man run to a car, which car had one tail light not functioning.

Another witness to testify was Stanley Zadwydos, who stated that shortly before 5:00 P.M. on October 1, 1981, he was driving on the Interboro Parkway near Queens Boulevard when his car was involved in an accident with a foreign car driven by the defendant. The witness copied the defendant's license plate number. The defendant fled the scene in his car and the witness pursued him. After the defendant's car became stuck in traffic, the witness' car caught up to the defendant's car. At that point the defendant came face to face with the witness. The witness testified that the defendant stated he was bleeding and was going directly to a hospital. The witness attempted to follow the defendant but lost him because the defendant was going at too great a speed. The witness then gave police officers Gerald Goodman and Donald Myerhoff the license number of the car and informed them of the accident. The police ran a check of the license number and stated that the owner was Marvin Pinkney.

At approximately 5:15 P.M., Officers William Pitzpatrick and Thomas McGovern of the 102nd Precinct were told over the police radio to go to the Jamaica Hospital Emergency Room. They were told a description of a perpetrator of a robbery, namely, a male black, dark clothing, dark hat, glasses, and about 6' to 6'2". They were told he might be injured. As they entered the ramp leading to the emergency room of the hospital, they noticed footprints of blood. The officers followed the prints into the emergency room to where a man was being treated for a leg injury. In response to a question by McGovern,

he stated he had been mugged by two white men, and had walked to the hospital. McGovern stayed with the man, who identified himself to McGovern as Marvin Pinkney, while Fitzpatrick traced the trail of blood. While tracing the blood, Fitzpatrick met Officers Goodman and Myerhoff, who informed him that they were looking for a Marvin Pinkney who had left the scene of an accident. Fitzpatrick said he did not know the name Marvin Pinkney. Fitzpatrick traced the trail of blood for about 1½ blocks to a yellow Toyota that had damage to its front and rear. He found the Toyota on a public street with keys laying on the hood of the car. He took the keys. Fitzpatrick noticed that the doors were unlocked. He opened the car door and saw a pool of blood inside the car on the driver's side. He then exited the car and looked in the passenger side window. He then notice an open bag with the handle of a gun protruding out of it. He then opened the car door and seized the bag which he then saw had two guns in it. Meanwhile, Goodman and Myerhoff told McGovern they were looking for one Marvin Pinkney who had left the scene of the accident. McGovern then asked Pinkney if he owned a vehicle, and whether he was involved in an accident. He answered both question negatively. Fitzpatrick then returned to the hospital with the bag and its contents as well as the keys. Though Fitzpatrick did not recall every touching the guns, McGovern said Fitzpatrick might have taken the two guns and holster out of the bag at the hospital. Fitzpatrick turned the bag and its contents, including the guns, which he stated he visually saw were loaded, to Detective Stanley Struel. At this point, Fitzpatrick knew the man in the hospital was Marvin Pinkney and then

learned a few minutes later that the car was registered to Marvin Pinkney. Struel then followed the blood tracks back to the car with Fitzpatrick. Struel took two pair of sunglasses from the dashboard of the Toyota, and returned to the hospital. Struel also watched while the bloodstained carpet was taken out of the car several hours later when the car was seized and returned to the 102nd Precinct. (Struel also said that when he checked, the guns were unloaded).

At this point, several people were called by the police to come to Jamaica Hospital. The testimony adduced at the hearing indicated that the witnesses were not informed of anything more than they were being called to look at someone who was being treated at the hospital. Upon their arrival they were told by Detective Struel to view someone, and then Struel would speak to them afterward. Beginning at 6:35 P.M. and for a short time thereafter, Thierry Auffray, Kimberly Auffray, Leonardo Mesa, Stanley Zadwydas, and Maurice McFarlane, each viewed the person of the defendant as the defendant lay conscious on his back on an emergency room table, covered by a sheet from the waist down. In the room, in addition to the defendant who was being treated for a leg injury, were medical personnel, and Detective Struel. The witnesses did not speak to each other immediately before or immediately after viewing the defendant. Each witness viewed the defendant separately, from a distance of no more than a few feet. After exiting the emergency room, Struel then asked each witness separately if he or she recognized the person viewed. Thierry Auffray positively identified the defendant as the person leaving the scene at the liquor store. Kimberly Auffray stated that the

defendant's skin color and build looked like that of the man she saw leaving the liquor store. She then stated that the man she saw had glasses. Struel then showed her two pair of glasses taken from the dashboard of the Toyota. She recognized one of them, and believed the man she viewed was the man seen running from the liquor store. Leonardo Mesa identified the defendant as the person seen running from the liquor store. Stanley Zadwydas identified the defendant as the man who fled the scene of the accident, and who told him he had been injured. Zadwydas, however, stated he was asked immediately before and immediately after the viewing by the police whether the defendant was the man involved in the accident with him. Maurice McFarlane stated he believed the man looked like the man he saw at the scene of the accident, and was positive of this.

The credible testimony also shows that immediately before Thierry Auffray, Kimberly Auffray, and Maurice McFarlance viewed the defendant, Detective Ward showed each of them clothes he had taken from a place that was in close proximity to the defendant. Some medical personnel told Detective Ward that the clothes were those of the defendant, and Detective Ward took them. Ward did not tell the witnesses whose clothing was being viewed. He showed the clothes to each witness separately, and out of the hearing of the others. The clothes were shown piece by piece. He didn't search the clothes but did feel them and knew they did not contain a gun, wallet or keys. The clothes were identified by the witnesses as those worn by the defendant. Leonardo Mesa and Stanley Zadwydas were shown the clothes after

viewing the defendant, and also identified the clothes as being worn by the defendant.

At approximately 6:50 P.M., Fitzpatrick formally placed the defendant under arrest. Struel read the defendant his rights. The defendant replied, "Don't bother. I go nothing to say."

After the arrest, Fitzpatrick searched the clothing of the defendant and seized a $20.00 bill, and a watch. He also seized keys but was unsure if they came from the defendant's clothing, or from the hood of the Toyota.

Fitzpatrick also testified that when he came back to the hospital with the guns taken from the Toyota, though he hadn't placed the defendant under arrest, he would not have let him leave. Fitzpatrick knew, however, that because of the defendant's physical condition, Pinkney wasn't going anywhere.

McGovern, however, stated that he would not have stopped the defendant if he wanted to leave when Fitzpatrick came back with the guns. He also stated that he was not an officer who was to make the arrest.

CONCLUSIONS OF LAW

The first issue to be determined by this Court is defendant's application to suppress physical evidence.

The police have the right to search and seize without a warrant if probable cause exists for the seizing officer to believe the contents of an automobile offend against the law. *People v. Martin*, 48 A.D. 2d 213; *Chambers v. Maroney*, 399 U.S. 42.

A vehicle containing contraband or instrumentalities of a crime can be quickly moved out of the jurisdiction in which a warrant to search can be issued. Because of this exigent circumstance, a warrantless search of a vehicle parked on a public street is consistent with the Fourth Amendment if the officer knows of if he has probable cause to believe the vehicle contains contraband or evidence of a crime. *Carroll v. U.S.*, 267 U.S. 132.

In the case at bar, the vehicle from which officer Fitzpatrick seized the guns was on a public street. Officer Fitzpatrick knew the vehicle contained contraband because from the outside of the car, he saw the handle of a gun sticking out of a bag. Therefore, Officer Fitzpatrick had a right to seize the guns, and his doing so did not violate the Fourth Amendment.

It should also be noted that with respect to the Fourth Amendment to protection of personal privacy, not property rights, is the primary object of constitutional limitations on search and seizure. The search of an auto is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building. *People v. Kreichman*, 37 N.Y. 2d 693.

This Court also finds that there was great potential danger to the general public if an intruder would remove the bag and its contents from the car. For this reason, the Court finds an additional exigent circumstance justifying the actions of the public. *Gordon v. Hartford*, 50 A.D. 2d 1054.

The seizure of the bag and its contents from the automobile can also be justified on the "plain view" theory. Criminal objects falling within the plain view of

the police who have a right to be in the position they are in are subject to seizure. *Harris v. U.S.*, 389 U.S. 347; *People v. Brosnan*, 32 N.Y. 2d 254.

Here, Officer Fitzpatrick was told by the defendant he entered the hospital through one entrance, and had come by foot. The officer, not knowing what he would find, in the course of good police work, observed blood leading from the defendant through some other door. He followed the blood. In the course of routine police investigation, he came upon an automobile, which automobile was unlocked and upon the hood of which lay a set of keys. He then spotted a half-opened bag with the handle of a gun protruding from it. This observation was a merely fortuitous observation of apparent contraband. See *People v. Rowell*, 27 N.Y. 2d 691.

If the police have the right to search and seize a vehicle initially because of exigent circumstances, they can later make a warrantless search and seizure of the same vehicle so long as it is within a reasonable period of time after the initial search. This later search can be made either on the street where the vehicle is located, or at the police garage. *People v. Fustanio*, 35 N.Y. 2d 196; *Gordon v. Hartford*, 50 A. D. 2d 1054. For this reason, Officer Struel was justified in removing the glasses of the defendant from the car. Similarly, the officers were able to seize the car and fully examine it at the police station.

The search of the car and its contents at the police station can also be justified as an inventory search by the police. *Cooper v. California*, 386 U.S. 58.

After the arrest of the defendant, his clothes were seized and searched. This was permissible, not so much

as a search incident to an arrest, but as an inventory of the personal effects of a person lawfully in detention. *People v. Perel,* 34 N.Y.2d 462.

This Court finds the defendant's rights have not been violated. The defendant's motion to suppress physical evidence, is, therefore, denied.

The next issue addressed by this Court is defendant's application to suppress identification testimony.

The People have the burden of going forward to show the legality of the police conduct in the first instance. However, it is the accused who must shoulder the burden of persuasion on a motion to suppress evidence of identification *People v. Rahming,* 26 N.Y. 2d 411 (1970). This Court finds the accused has not met his burden.

The law is clear that, "although showups are generally disfavored testimony of an identification made at a showup need not be suppressed unless it is found, upon consideration of the totality of circumstances that the confrontation was so unnecessarily suggestive and conducive to irreparable misidentification that [the defendant] was denied due process of law. *Stovall v. Denno,* 388 U.S. 293, 302; *People v. Logan,* 25 N.Y. 2d 184." *People v. Robert Smith,* 46 A.D. 2d 639 (1974), aff'd. 38 N.Y.2d 882 (1976).

In *People v. Logan,* supra, at p. 194, the Court of Appeals, in setting the criteria for a showup that if fair and consonant with due process of law, stated that, "It is quote evident that the *Wade-Gilbert* Standards are not designed to frustrate good police work which produces

the prompt or instantaneous and therefore most reliable identification of culprits."

In *People v. Robert Smith* supra, the Court found that the accused was not denied due process of law. The witness, after having given the police a description of her assailants, identified the accused just forty-five minutes after the event. The Court found the identification was made when the witness' memory was freshest, a procedure which the Court found emanated from the witness' own observations made during the commission of the crime. Also, it appeared that the police did not make any suggestive comments relative to the identification.

In the case at bar, this Court finds that the identifications made by each of five witnesses, Maurice McFarlane, Kimberly Auffray, Thierry Auffray, Leonardo Mesa, and Stanley Zadwydos, was each made as a result of his or her own observations of the defendant within a period that was less than two hours after the initial viewing. In each case, the witness had an initial opportunity to observe the defendant at fairly close range as the defendant left the area of the liquor store, except for Stanley Zadwydos, who had the same opportunity after the car accident. In each case, the defendant was described to the police, which description also included the clothes he was wearing. Within two hours, each witness separately viewed the defendant from extremely close range at the hospital, and identified him.

In should be noted that in each case, the police called the witnesses to the hospital, but did not state the reason. In addition, the police did not make any suggestive comments, except to Stanley Zadwydos, before or after the

witnesses' viewing the defendant and his clothes. It was the witness' own observation in each case that the person viewed was the person seen on the prior occasion.

Even if the showup might have been considered suggestive, which this court does not so find, except possibly with respect to Stanley Zadwydos, this does not necessarily mean the showup violates due process. The test is whether the pre-trial identification is so unnecessarily suggestive as to lead to misidentification. Based upon the totality of circumstances, it must be determined if the identification was reliable. See *Stovall v. Denno*, supra. In determining if an identification is reliable, even though suggestive, factors to be considered were set forth in *Neil v. Biggers*, 409 U.S. 188 (1972), at p.199-200. The factors set forth were:

(1) Opportunity to view the criminal at the time of the crime;

(2) Witnesses degree of attention;

(3) Accuracy of witnesses prior description of criminal;

(4) Degree of certainty at time of confrontation;

(5) Length of time between crime and the confrontation.

Based upon a consideration of the factors above enunciated, this Court finds that though suggestive comments might have been made to Stanley Zadwydos, his identification was reliable. As with all the witnesses, under the totality of circumstances, the showup procedure did not violate due process.

This Court finds the defendant's rights have-not been violated. The defendant's motion to suppress pre-trial identification is therefore denied.

Finally, this Court finds that any statements made by the defendant were freely and voluntarily made, and need not be suppressed.

Accordingly, defendant's motion to suppress all physical evidence, pre-trial identification testimony, and any statements made, is denied.

/s/ MARTHA K. ZELMAN, J.S.C.

DATED: OCTOBER 25, 1982